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No. 07-1

In The
Supreme Court of the United States

WARDEN HUGH SMITH and
SANCHE MARTIN,

Petitioners,

v.

JAMIL AL-AMIN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether prison officials violate the First Amendment rights of a convicted felon when they open – but do not read – his legal mail outside of his presence.

2. Whether it was clearly established in the Eleventh Circuit, for qualified immunity purposes, that prison officials violate the First Amendment rights of a convicted felon when they open – but do not read – his legal mail outside of his presence.

PARTIES TO THE PROCEEDINGS

The parties are as shown in the caption of the case.

Petitioners before this Court and Appellants/ Defendants below are: Sanche Jackson, Administrative Assistant at Georgia State Prison and Hugh Smith, Warden at Georgia State Prison;

Respondent before this Court and Appellee/ Plaintiff below is Jamil Al-Amin.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Warden Hugh Smith and Sanche Jackson respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 511 F.3d 1317 (11th Cir. 2008), and is further reproduced in the Appendix to this Petition ("Pet. App.") 1. The order of the Court of Appeals denying the petition for rehearing *en banc* is not reported but is reproduced in Pet. App. 63. Neither the district court order denying the motion for summary judgment nor the order denying the motion for reconsideration are reported, but they are reproduced in Pet. App. 56 and Pet. App. 42.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on January 7, 2008. Pet. App. 1. A timely filed motion for rehearing *en banc* was denied on February 27, 2008. Pet. App. 63.

STATUTES INVOLVED: RELEVANT PROVISIONS INVOLVED

Respondent Jamil Al-Amin seeks damages for an alleged violation of his First Amendment rights pursuant to 42 U.S.C. § 1983. The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and petition the Government for a redress of grievances." U.S. Const. amend. I.

STATEMENT

This case presents the issue of whether the mere opening, but not reading, of legal mail outside the presence of an inmate violates the inmate's First Amendment rights. The Eleventh Circuit held that it does – even though the court acknowledged that doing so does not violate the inmate's right to access-to-courts, even though no other category of mail must be opened in the inmate's presence, and even though this Court held in *Shaw v. Murphy*, 532 U.S. 223 (2001), that prison officials do not need to carve out content-based exceptions to their general rules regarding prison communications. In so holding, the Eleventh Circuit also expanded an existing circuit split on the issue.

This case also presents an important issue regarding the scope of the qualified immunity defense. The Eleventh Circuit held that petitioners are not entitled to qualified immunity on respondent's *free speech* claim because a prior ruling of the court held that opening inmates' mail outside their presence violates their right to access-to-courts. Moreover, the court relied on its earlier access-to-courts ruling even though it acknowledged that this Court's decision in *Lewis v. Casey*, 518 U.S. 343 (1996), meant that prisoners cannot make out access-to-courts claims based on mail being opened outside their presence. All told, the Eleventh Circuit's decision constitutes a dramatic shrinking of state officials' qualified immunity.

1. District Court Proceedings

Jamil Al-Amin, formerly known as H. Rap Brown, is serving a life sentence for the shooting of two and killing of one law enforcement officer.[1] He filed suit, *pro se*, in the United States District Court for the Southern District of Georgia claiming that the Warden and Administrative Assistant (hereinafter petitioners) at the maximum security prison in which he was housed violated his right to access-to-courts and his First Amendment right to free speech by

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[1] *See Al-Amin v. Wetherington*, 165 Fed. Appx. 733 (11th Cir. 2006).

opening letters from his counsel outside of his presence.[2] Al-Amin asserted that petitioners opened legal mail from his attorney and wife, Karima Al-Amin. (R1-1).

Upon realizing that Ms. Al-Amin's letters came from a law office, the Warden asked Al-Amin to identify his attorneys. Al-Amin did so but did not include the name of his wife on the list. (R2-19, Ex. B, C, and D). As a result, petitioners treated Ms. Al-Amin's mail as non-legal mail. *Id.* Al-Amin alleges that, after he complained that his wife's mail should be treated as legal mail, petitioners continued to open his mail from his wife. (R1-1-4-5, Ex. A-E). While Al-Amin offered evidence that the envelopes containing the correspondence had been opened outside his presence, he never offered any evidence as to the contents of the envelopes and made no showing that the envelopes actually contained privileged materials. *Id.*

Petitioners filed a motion for summary judgment and argued, among other things, that even if Al-Amin's mail had been opened, there was no showing of harm or a breach of privilege as a result of their alleged conduct and thus no constitutional violation occurred. (R1-17). Alternatively, the petitioners

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[2] Initially Al-Amin alleged that prison officials read his mail but this claim was abandoned on appeal. For purposes of the proceedings in this Court, petitioners do not dispute that Ms. Al-Amin was acting as her husband's attorney.

argued that they were entitled to qualified immunity because it was not clearly established that their conduct amounted to a constitutional violation. *Id.* The district court disagreed and found that the opening of legal mail outside of the presence of the inmate constituted a denial of access to the courts and a violation of the First Amendment.[3] Pet. App. 42. The district court further found that petitioners were not entitled to qualified immunity because it was clearly established that prison officials could not open legal mail outside the presence of the inmate. *Id.* Petitioners filed a motion for reconsideration which was denied. R2-28; Pet. App. 52. Petitioners filed an interlocutory appeal on the denial of qualified immunity.

2. Court of Appeals Proceedings

The Eleventh Circuit appointed counsel and the parties agreed that the sole issue for appeal was the opening of Al-Amin's legal mail after prison officials were notified by Al-Amin that his legal mail was being opened. Pet. App. 10 n.13. In its decision, the Court of Appeals reversed the district court on Al-Amin's access-to-courts claim. The Court of Appeals noted that in *Taylor v. Sterrett*, 532 F.2d 462 (5th Cir. 1976), and *Guajardo v. Estelle*, 580 F.2d 748 (5th Cir.

[3] The parties consented to transfer the case to a magistrate judge for disposition. In order to be consistent with references by the court of appeals, petitioners will use the term "district court."

1978), the pre-1981 Fifth Circuit (whose decisions are binding precedent in the Eleventh Circuit) held that opening legal mail outside an inmate's presence violates the inmate's access-to-courts right. The Eleventh Circuit then analyzed whether *Taylor* and *Guajardo* controlled in light of this Court's intervening decisions in *Turner v. Safley*, 482 U.S. 78 (1987), and *Lewis v. Casey*, 518 U.S. 343 (1996). The court concluded that *Taylor* and *Guajardo* survive *Turner*, but that Al-Amin's access-to-courts claim must fail under *Casey*. In *Casey*, this Court held that a constitutional claim for a violation of the right to access-to-courts requires evidence of actual harm to a non-frivolous lawsuit. The Eleventh Circuit ruled that, because Al-Amin failed to allege or present evidence of actual injury or damage to any case, his access-to-courts claim must fail. Pet. App. 33.

The Eleventh Circuit, however, affirmed the district court's ruling that petitioners violated Al-Amin's free speech rights. In so doing, the court specifically held that "(1) Al-Amin's free speech claim is distinct from his access-to-courts claim; (2) [petitioners'] conduct violated his right to free speech; and (3) [Al-Amin] need not show any actual injury beyond the free speech violation itself to state a constitutional claim." Pet. App. 33. In making its decision, the Court of Appeals relied on the principle that the use of mail is a protected free speech right and that inmates retain that right. Pet. App. 33. The court ruled that opening incoming privileged mail "interfere[d]" with Al-Amin's ability to communicate with

his attorney and thus constituted a violation of his right to free speech, even absent a showing of actual harm to any case. Pet. App. 33.

Finally, the Eleventh Circuit held that petitioners were not entitled to qualified immunity because *Taylor* and *Guajardo* put them on notice that their actions violated clearly established law. Pet. App. 38. Even though the Court of Appeals found no access-to-courts violation, the court concluded that *Taylor* and *Guajardo* (which were access-to-court cases) "clearly establish[ ] that a prison official violates an inmate's constitutional rights when the official opens attorney mail outside the inmate's presence." Pet. App. 38-41. And as to petitioners' assertion that prior precedent regarding access-to-courts claims does not clearly establish the law with respect to inmates' free speech rights, the court ruled that "[w]e have never required that, in order for an official to know that his conduct is unlawful, a reasonable official must be able to cite by chapter and verse all of the constitutional bases that make his conduct unlawful." Pet. App. 39. It is from this decision that the prison officials seek certiorari.

REASONS FOR GRANTING THE PETITION

A writ of certiorari is warranted because the Eleventh Circuit's decision expands a split among the circuits that have considered the underlying constitutional question of whether the opening, but not

reading, of an inmate's legal mail amounts to a First Amendment violation separate and distinct from an access-to-courts claim. Moreover, the holding wrongly creates a new prophylactic legal rule whose very premise is that prison officials are unwilling to abide by the Constitution. The Eleventh Circuit's qualified immunity holding also warrants this Court's review. Its conclusion that prior circuit precedent on the right to access-to-courts provided "fair notice" that petitioners were violating respondent's free speech rights dramatically shrinks the protections qualified immunity is intended to provide state officials.

I. CERTIORARI SHOULD BE GRANTED TO REVIEW THE ELEVENTH CIRCUIT'S HOLDING THAT INMATES HAVE A FIRST AMENDMENT "FREE SPEECH" RIGHT TO HAVE THEIR LEGAL MAIL OPENED ONLY IN THEIR PRESENCE.

This Court conclusively decided that inmates have a right to receive and send mail. *Thornburgh v. Abbott*, 490 U.S. 401, 412 (1989); *Procunier v. Martinez*, 416 U.S. 396, 413-414 (1974). The Court has repeatedly clarified, however, that this right is not absolute and that prison officials may subject inmates' mail to inspection or perusal. *Id.*; *Turner v. Safley*, 482 U.S. 78 (1987). And the Court has specifically held that prison officials may inspect legal mail when opened in the presence of the inmate. *Wolff v. McDonnell*, 418 U.S. 539, 577 (1974). In *Wolff*, the Court ruled that, by opening legal mail in the presence

of the inmate, prison officials "have done all, and perhaps even more than the constitution requires." *Id.* at 577. The Court thereby left open the question whether the Constitution permits prison officials to open and inspect an inmate's legal mail *outside* the presence of the inmate.

After *Wolff*, many Courts found that the opening of legal mail outside an inmate's presence constituted a violation of the inmate's right to access to the courts. This Court discredited these holdings in *Lewis v. Casey*, 518 U.S. 343, 349 (1996), when it ruled that an inmate cannot establish an access-to-courts claim absent a showing of actual harm to a specific case. It is difficult to imagine a prisoner making that showing based on the mere opening of his legal mail by prison officials. That did not resolve the opening-legal-mail issue once and for all, however, because prisoners separately asserted that opening legal mail outside their presence violated their free speech rights. Many lower courts have addressed that issue, and they have reached conflicting results. In holding that prison officials are constitutionally barred from opening inmates' legal mail outside their presence, the Eleventh Circuit not only deepened that conflict, but failed to abide by this Court's precedents, and diminished prison officials' ability to manage their institutions.

A. The Courts of Appeals Are Deeply Divided On The Issue.

The Eleventh Circuit's decision creates a 4-2 split on whether opening inmates' legal mail outside their presence violates their free speech rights. The Eleventh Circuit decision directly conflicts with a materially indistinguishable Fifth Circuit decision. In *Brewer v. Wilkinson*, 3 F.3d 816 (5th Cir. 1993), the Fifth Circuit held that prison officials did not violate an inmate's right to access-to-courts or his rights under the First Amendment when the prison officials opened – but did not read – the inmate's legal mail outside of his presence. In overturning its decisions in *Taylor v. Sterrett*, 532 F.2d 462 (5th Cir. 1976), and *Guajardo v. Estelle*, 580 F.2d 748 (5th Cir. 1978), the court found that where the inmate did not "allege that [his] mail has been censored," the violation of the legal mail policy did not state a cognizable constitutional claim. *Brewer*, 3 F.3d at 825. The Fifth Circuit specifically relied upon this Court's reasoning in *Turner v. Safely* and acknowledged that while prisoners have a right to receive mail, that right did not extend freedom from inspection. *Id.*

The Seventh Circuit reached the same conclusion in an unpublished decision. In *Lewis v. Cook County Bd. of Commissioners*, 6 Fed. Appx. 428 (7th Cir. 2001), the court found that where prison officials opened an inmate's legal mail outside of his presence his First Amendment rights were not violated. Specifically the Court found that, although the inmate claimed that the opening of his legal mail had a

"chilling effect" on his speech, absent either an allegation of a content-based prison practice or an allegation that the legal mail was lost or delayed, he failed to state a valid claim under the First Amendment. *Id.* at 430. *See also Vasquez v. Raemisch*, 480 F. Supp. 2d 1120 (D. WI 2007) (attorney-client privilege is not a constitutional right and thus opening of legal mail does not amount to a constitutional violation subject to the *Turner v. Safley* reasonableness analysis).

In contrast, the Second, Third, Sixth, and Eleventh Circuits have held that prisoners have a First Amendment right to have their legal mail opened in their presence. In *Davis v. Goord*, 320 F.3d 346 (2nd Cir. 2003), the Second Circuit held that the opening of an inmate's legal mail outside of his presence implicates both his right to access to the courts and his right to free speech. In doing so, the Court limited its holding by noting that "an isolated incident" would not support a claim. *Id.* at 351.

Likewise, in *Jones v. Brown*, 461 F.3d 353 (3rd Cir. 2006), the Third Circuit determined that the Department policy requiring that mail be opened off site to avoid potential contamination from anthrax was an unconstitutional infringement of the inmates' First Amendment rights. In so finding, the court found that the prison failed to show any evidence of a connection between the mail policy and the threat of an anthrax attack on New Jersey's prisons. *Id.* at 364. *See also Bieregu v. Reno*, 59 F.3d 1445 (3rd Cir. 1995). And in *Muhammad v. Pitcher*, 35 F.3d 1081 (6th Cir. 1994), the Sixth Circuit held that a policy of opening

legal mail from the Office of the Attorney General outside his presence constituted a violation of the inmate's right to free speech. The court reasoned that, even though there was no privileged communication in the opened letters, the inmate's First Amendment rights were violated because of the potential chilling effect on the inmate's free speech. *Id.* at 1083; *see also Powell v. Kelley*, 782 F.2d 1043 (6th Cir. 1985).

Only this Court can resolve the circuit split and ensure that constitutional limits on prison officials' authority are uniform throughout the country. There is no reason to believe that the conflict will disappear. The Court's decisions in *Lewis v. Casey* and (as discussed below) *Shaw v. Murphy,* 532 U.S. 223 (2001), should have led the lower courts to agree with the Fifth Circuit. Instead, the conflict is only increasing as courts such as the Eleventh Circuit continue to hamstring prison officials unnecessarily.

B. The Eleventh Circuit's Decision Conflicts With Decisions of This Court.

In reaching its decision the Eleventh Circuit relied on precedent that predated this Court's decisions in *Turner v. Safley*, 482 U.S. 78 (1987), and *Shaw v. Murphy,* 532 U.S. 223 (2001). It is undisputed that prison officials may open prisoners' mail outside of their presence to inspect for contraband. *Id.* This Court in *Shaw* rejected the idea that district courts can carve out content-based exceptions in applying the *Turner* test, and specifically rejected

carving out an exception for legal advice (there, provided from one inmate to another). The Court held that courts are not "permitted to enhance constitutional protection based on their assessments of the content of particular communications" and that the "*Turner* test, by its terms, simply does not accommodate valuations of content." *Shaw*, 532 U.S. at 228. The decision of the Eleventh Circuit conflicts with this holding by awarding "enhance[d] constitutional protection" based on the presumed legal content of the mail.

In addition, the Eleventh Circuit's decision allows prisoners to avoid the "actual injury" limitation outlined in *Casey* by simply reclassifying the claim as one under the First Amendment. The Court found that the opening of Al-Amin's legal mail "chilled" his speech. The court made no finding that the "chilled" speech would have related to a particular case or that Al-Amin was otherwise unable to communicate with his counsel. To the contrary, the Court specifically acknowledged that the evidence provided by Al-Amin did not show an injury to "specific cases or claims being pursued, nor any deadlines missed." Courts have consistently held that mail can be opened and searched. The alleged "injury" of chilled speech exists as to all mail, not just legal mail; absent evidence (not alleged here) that the right to counsel or access to the courts has been impeded, there is basis in the Constitution to treat legal mail any differently than regular mail.

Finally, even assuming that the "chilling of speech" in this context amounts to a constitutional violation, it is the reading of mail not the opening of the mail that creates the chilling effect. The Eleventh Circuit's ruling imposes, as a constitutional requirement, a prophylactic measure designed to avoid that effect. Even in the criminal context where the accused is clearly entitled to greater protection, the failure to provide prophylactic protection, such as *Miranda* warnings, does not in and of itself amount to a constitutional claim. *See United States v. Patane*, 542 U.S. 630, 641 (2004). The claim from the failure to provide a prophylactic measure arises only when the constitutional violation occurs, not from the failure to properly administer the protection. Since Al-Amin and other inmates suffer from no actual harm from the simple opening of their legal mail, they do not state a valid claim absent some prejudice to an existing constitutional right such as the right to counsel or access to the courts. In finding to the contrary, the Eleventh Circuit improperly created a new constitutional right without the requisite showing of injury.

C. The Eleventh Circuit's Decision Impedes The Safe and Secure Operation of Prisons.

Neither the Eleventh Circuit decision nor Al-Amin suggests that a prison does not have a right to open and search non-legal mail outside of the inmate's presence. Rather, the court adopted the premise that there is a right to have legal mail treated

differently. Once the Court accepted that there were valid security reasons to search mail, the inquiry should have stopped there. The question is not, "Is it better to search legal mail in the presence of the inmate," but rather is it constitutionally required to treat legal mail differently than other mail outside of the context of the Sixth Amendment and the right to access to the Courts. Since there is no such constitutional right, the test for mail should be equally applied.

The distinction drawn by the Eleventh Circuit is based upon the unrealistic belief that mail that appears to be from an attorney is somehow less likely to be forged or contain contraband and thus requires a different application of the *Turner* analysis. First, in this era of computer graphics, color copiers and printers, the ingenuity of those seeking to circumvent prison mail procedures should not be underestimated. Moreover, just because an item is marked as legal mail and is arguably from a legitimate source does not necessarily mean that it is devoid of contraband. *See United States v. Young*, 146 Fed. Appx. 824 (6th Cir. 2005) (inmates planned to smuggle hacksaw blade into institution under guise of legal mail); *Felton v. Lincoln*, 429 F. Supp. 2d 226 (D. Mass. 2006) (inmate bragged that he had fraudulently communicated with friends who sent letters in phony attorney envelopes); *Harper v. Beard*, 2:05CV01803, 2007 U.S. Dist. LEXIS 55044 (D. Pa. April 23, 2007) (noting that escape attempt was facilitated through use of mail marked as legal mail). To presume that every letter

that appears to be from a lawyer warrants constitutional protection beyond that applied to other mail expands the protections afforded by the Constitution and in doing so jeopardizes the safety of the prisons.

II. THE ELEVENTH CIRCUIT DECISION IS CONTRARY TO THIS COURT'S QUALIFIED IMMUNITY PRECEDENT

The lower court's decision is contrary to this Court's qualified immunity precedent. The Eleventh Circuit found that the law was clearly established despite the existence of intervening Supreme Court precedent that overrules or diminishes the circuit court authorities that purportedly "clearly established" the law. In addition, the Eleventh Circuit mistakenly held that the law regarding a specific constitutional right, in this case an inmate's right to access-to-courts, can "clearly establish" the law of a separate and distinct constitutional right, in this case the First Amendment right to free speech.

In so holding, the Eleventh Circuit reasoned as follows: "[O]ur precedent . . . clearly establishes that a prison official violates an inmate's constitutional rights when the official opens attorney mail outside the inmate's presence. *See Taylor*, 522 F.2d at 462; *Guajardo*, 580 F.2d at 748. Thus, we conclude that defendants had fair and clear notice that opening Al-Amin's attorney mail outside his presence was unlawful and violated the Constitution." Slip Op. 37. It does not matter, held the Eleventh Circuit, that *Taylor* and

Guajardo involved access-to-court claims, while Al-Amin's only surviving claim is based on the Free Speech Clause. The court stated, "We have never required that, in order for an official to know his conduct is unlawful, a reasonable official must be able to cite by chapter and verse all of the constitutional bases that make his conduct unlawful." Slip Op. 37.

That reasoning misreads *Lewis v. Casey*, wrongly conflates access-to-court claims and free speech claims, ignores the Fifth Circuit's rejection of *Taylor* and *Guajardo*, and dilutes the fair notice requirement. Prior to the Eleventh Circuit's decision, the law in the Eleventh Circuit did *not* clearly establish that prison officials violate the Free Speech Clause when they open a prisoner's legal mail outside his presence. The Eleventh Circuit's holding to the contrary over-deters prison officials and merits this Court's review.

A. The Opinion Below Misreads *Lewis v. Casey*.

The Eleventh Circuit's reasoning is premised on the notion that petitioners did, in fact, violate Al-Amin's clearly established constitutional right of access-to-courts. In the Court of Appeals' view, Al-Amin may lack standing under *Lewis v. Casey* to assert that constitutional violation, but this does not negate the fact that petitioners had "'fair warning' . . . that that their precise conduct (opening an inmate's attorney mail outside his presence) is unlawful and a constitutional violation." Slip Op. 36. That

reasoning fundamentally misconstrues the holding of *Lewis v. Casey*.

In *Casey*, this Court clarified that the right protected by the access-to-courts doctrine is not "the right to a law library or to legal assistance," but rather is the "right of *access to the courts*." 518 U.S. at 350 (emphasis in original). A prisoner who cannot show that prison officials "hindered his efforts to pursue a legal claim," *Id.* at 351, has failed to establish an essential element of his access-to-courts claim. *Casey* thereby instructed prison officials throughout the country that they do *not* violate the Constitution when they impede access to legal assistance in a manner that does not "hinder[ ]" a prisoner's "efforts to pursue a legal claim." It follows that petitioners were *not* given "fair notice" that their practice of opening Al-Amin's legal mail outside his presence – which undisputedly did not impede his access-to-courts – violated the Constitution.

To be sure, the Court in *Casey* described the "actual injury" requirement as being related to the standing doctrine. *See id.* at 349. Any assessment of that requirement, however, required a precise definition of the right in question. As the Court observed, if "the right at issue – the right to which the actual or threatened harm must pertain – were the right to a law library or to legal assistance," a mere claim that the prison law library was inadequate would state a claim. *Id.* at 350. But, as noted, the Court held that "the right at issue" was far narrower and requires a showing that prison officials were blocking a prisoner's "efforts to

pursue a legal claim." When prison officials do not "hinder[]" a prisoner's "efforts to pursue a legal claim," they do not violate the constitutional right of access-to-courts. It is undisputed that Al-Amin has not made that showing here. The Eleventh Circuit was therefore wide of the mark when it concluded that, even though petitioners did not violate Al-Amin's right to access-to-courts, they had "fair warning" that opening Al-Amin's legal mail outside his presence somehow still violated the Constitution.

B. The Law Regarding Al-Amin's Free Speech Rights Was Not Clearly Established.

1. The Eleventh Circuit's next erroneous leap of logic was to assume that, because (in the court's view) *Taylor* and *Guajardo* clearly established that petitioners' conduct violated Al-Amin's right of access-to-courts, it necessarily follows that they had clear notice their actions violated Al-Amin's free speech rights. That reasoning incorrectly assumes that prisoners' right of access-to-courts is coterminous with their free speech right. In fact, many access-to-court claims do not state First Amendment claims and *vice versa*. Clear notice concerning the access-to-court doctrine (even were that present here) does not provide clear notice of what conduct violates prisoners' First Amendment rights.

At its most basic, the right to access guarantees meaningful access to the courts. *Bounds v. Smith*, 430

U.S. 817, 823 (1997). As clarified in *Casey*, it is the right to bring a grievance to court. *Casey*, 518 U.S. at 354. The right is not unlimited, and extends only to providing the tools needed for inmates to attack their sentences and challenge their conditions of confinement. *Id.* at 355. *Casey* recognized that all "other litigating capacity" is incidental to the consequences of conviction and incarceration. *Id.* Thus, as it relates to prison officials, the right to access-to-courts protects only against interference with inmates' attempts to prepare and file legal documents. *Id.* at 350.

The contours of inmates' right to free speech are very different. Inmates retain only those free speech rights that are "not inconsistent with [their] status as prisoner[s] or with the legitimate penological objectives of the corrections system." *Pell v. Procunier*, 417 U.S. 817, 822 (1974). Inmates' speech may be curbed if the restriction is related to a legitimate penological objective. *Turner*, 482 U.S. at 89. *Turner's* fact-based four-part test is used to determine reasonableness, and looks to the relationships between restriction, the governmental interest, the right being exercised, the impact on the allocation of prison resources, and the existence of alternative. *Id.* at 89-90.

Thus, there are substantial differences between the standards that govern these separate and distinct constitutional rights. The analysis for the right to access-to-courts looks to the narrow issue of whether there is interference with attempts to prepare and file legal documents, while the free speech analysis engages in the highly-fact-intensive *Turner* balancing

test that incorporates several different factors. Given these differences, reasonable prison officials would not know that a violation of the access-to-courts doctrine necessarily means a violation of free speech.

2. The Fifth Circuit's ruling in *Brewer v. Wilkinson* further undermines the Eleventh Circuit's conclusion that petitioners were on "fair notice" that their opening of Al-Amin's mail violated the First Amendment. As discussed earlier, in *Brewer* the Fifth Circuit concluded that *Turner v. Safley* undermined its earlier rulings in *Taylor* and *Guajardo*. *Brewer,* 3 F.3d at 823-24. The Fifth Circuit therefore overruled *Taylor* and *Guajardo*, and held that neither the right of access-to-courts nor the First Amendment is violated when prison officials open prisoners' legal mail outside their presence. *Id.*

Prison officials in the Eleventh Circuit surveying the legal landscape between 2003 and 2005 would have had good reason to believe that *Taylor* and *Guajardo* no longer controlled. As even the Eleventh Circuit recognized here, *Lewis v. Casey* undercut those cases' access-to-courts holdings. And the other circuit covered by *Taylor* and *Guajardo* repudiated those decisions. The state of the law with respect to where prisoners' legal mail may be opened was anything but clear.

In this case the Eleventh Circuit relied on case law that has been called into serious doubt as a result of intervening Supreme Court case law. As a result, prison officials could not possibly have been put on

notice that their conduct was unconstitutional. Nor could prison officials have had notice that case law discussing inmates' constitutional rights to access-to-courts clearly established inmates' constitutional rights to free speech. The decision of the lower court puts the law in flux. Prison officials will be hesitant to act in any situation for fear that their conduct may later be found to violate an as yet undefined constitutional right. Such a finding conflicts with the basic purpose of qualified immunity. As stated by this Court, "'officials should not err always on the side of caution' because they fear being sued." *Hunter v. Bryant,* 502 U.S. 224, 229 (1991).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 06-15248

D. C. Docket No. 05-00025-CV-6

JAMIL AL-AMIN,

Plaintiff-Appellee,

versus

WARDEN HUGH SMITH,
ADMIN. ASST. SANCHE M. MARTIN,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Georgia

(Filed January 7, 2008)

Before TJOFLAT, HULL and WILSON, Circuit Judges.

HULL, Circuit Judge:

In this 42 U.S.C. § 1983 action, plaintiff-appellee, a state prisoner, alleges that defendants-appellants repeatedly opened his privileged attorney mail outside of his presence and thereby violated his constitutional rights to access to the courts and free speech.

Defendants appeal the denial of their motion for summary judgment on qualified immunity grounds. After review and oral argument, we reverse the district court's qualified immunity ruling as to plaintiff's access-to-courts claim but affirm as to plaintiff's free speech claim.[1]

I. BACKGROUND

From 2002 to 2007, plaintiff Jamil Al-Amin was a prisoner at Georgia State Prison ("GSP"), operated by Georgia's Department of Corrections ("DOC").[2] Defendants are Hugh Smith, GSP warden, and Sanche Martin, his assistant.

A. DOC's Mail Policy

The DOC policy known as "SOP IIB04-0001" provides certain mail privileges to inmates at Georgia prisons. Specifically, SOP IIB04-0001 provides that correspondence between inmates and their attorneys is "privileged mail." An inmate's attorney includes "any attorney with whom the inmate has had, or is attempting to establish, an attorney client relationship" and who is licensed to practice in state or

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[1] The parties consented to transfer the case to a magistrate judge, but, for simplicity, we use the term "district court."

[2] Al-Amin entered the DOC on March 23, 2002. In August 2007, the state transferred Al-Amin to a federal prison, citing security concerns. Al-Amin is still serving a state life sentence but is housed in a federal facility.

federal courts. The policy provides for *external* inspection of privileged mail "by fluoroscope, metal detecting device, or manual inspection for the purpose of detecting contraband."[3]

Following an external inspection, "an appropriately designated staff member may open and inspect (but *not* read) all privileged mail *in the presence of the inmate/probationer* to whom it is addressed." Thus, under DOC's own policy, GSP may not read Al-Amin's attorney mail and may open it only in his presence.[4]

B. Mail from Al-Amin's Wife

In 2002, plaintiff's wife, Karima Al-Amin ("Karima") began sending legal correspondence marked "legal mail" to him. Karima is a licensed attorney practicing in Atlanta, Georgia.

From April 13, 1999 to August 1, 2004, defendant Martin oversaw the daily operations of the prison mailroom.[5] Martin admits that, in April 2002, she accidentally opened a letter from Karima. As Martin

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[3] The DOC policy also states that incoming privileged mail "shall be treated as privileged only if the name and official status of the sender appears commercially printed on the envelope." Incoming privileged mail may be held for two days to allow officials to verify the privileged status of the sender.

[4] In this opinion we use the terms "privileged mail" and "attorney mail" interchangeably.

[5] During the Christmas holidays in 2004 and 2005, Martin also worked in the mailroom but did not supervise any mail staff at that time.

resealed the letter, she saw that Karima was an attorney and that the letter came from Karima's law office. Martin informed Warden Smith that Al-Amin had received "mail of a personal nature" from his attorney-wife.

In May 2002, Warden Smith asked Al-Amin for a list of his attorneys of record. Smith asked for the list because Al-Amin had a number of attorneys and Smith did not want mailroom staff opening Al-Amin's legal mail outside Al-Amin's presence. Al-Amin gave Smith the names of five attorneys, but did not include Karima.[6] Because Al-Amin did not identify Karima as one of his attorneys, Smith informed Martin and other mailroom staff that Karima's letters should be treated as regular mail. According to Smith and Martin, Al-Amin and Karima never informed them that Karima was representing Al-Amin.

C. August 2003 Grievance

In 2003, Officer James Jones, who brings legal mail to inmates, told Al-Amin that Martin was opening legal mail from Karima. Al-Amin then filed an August 2003 grievance alleging that Martin had "knowingly[,] ignoring and disregarding D.O.C. Policy,

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[6] The attorney list is contained in a memorandum from Warden Smith to the inmate file, which states that Al-Amin "submitted the below list" to Lt. Larry Brewton. While Al-Amin does not remember submitting a list in May 2002, he does not deny that this occurred.

instructed that my Legal Mail is to be opened." Al-Amin's grievance listed his nine attorneys, including his wife. Al-Amin requested that his privileged mail be treated as such.

On September 19, 2003, Warden Smith denied the grievance, stating that "[n]o evidence was found to support the allegations you made against Ms. Martin. Mail is processed within established guidelines." On September 25, 2003, Al-Amin filed a grievance appeal, repeating his allegations and stating that "[m]y wife is one of my lawyers and should be shown the respect of any attorney."

On November 13, 2003, as part of the grievance investigation, Theresa Jarriel submitted a sworn statement based on a telephone interview with Martin. Martin told Jarriel that: (1) when Al-Amin came to GSP, he received legal mail in envelopes with preprinted business labels from his wife; (2) "a lot of the privileged mail had personal letters in it although some of the envelopes contained legal transcripts and such"; and (3) because Al-Amin was asked to list his attorneys and Karima was not included, Warden Smith instructed mailroom staff to open all mail received from Karima, whether privileged or not, before taking it over to Al-Amin's building.

On November 14, 2003, Warden Smith submitted a sworn statement that "Al-Amin's legal mail received from any attorney of record is opened in his presence as established in policy. Mail received from his wife who I am told is an attorney or legal representative

has been opened outside of inmate Al-Amin's presence." On November 18, 2003, Smith sent a memorandum to the DOC's Assistant Regional Director and the lead investigator for Inmate Affairs and Appeals stating that mail arriving for Al-Amin would be processed as privileged mail as long as it met the criteria under the mail policy.

D. November 25, 2003 Grievance Response

On November 25, 2003, Raymond Head, manager of the Inmate Affairs Unit, issued a grievance response. According to Head's response, Al-Amin's allegation was "referred to the appropriate staff for appropriate action to ensure this does not occur again in the future." Warden Smith received Head's grievance response and instructed Martin to now treat all mail from Karima as legal, privileged mail and to open it in Al-Amin's presence. Martin, in turn, instructed the mailroom staff to treat mail from Karima as legal mail.

In her affidavit, Martin states that after November 25, 2003, she treated all of Karima's mail as legal mail and she never opened any of it outside Al-Amin's presence.[7] Martin avers that she never instructed or

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[7] Prison records indicate that the only time that Al-Amin's privileged mail was opened outside of his presence was December 31, 2002, when a letter from Associated Legal Services was opened by mistake. However, we note that Martin herself admits opening a letter from Karima's law office in April 2002. Also, Warden Smith admits that in 2002 he informed Martin and the

(Continued on following page)

permitted any individuals to inspect Al-Amin's privileged mail.[8] If any of Karima's mail was opened outside Al-Amin's presence after November 25, 2003, Martin states, "it was inadvertently done by the mail room sorter."

According to Warden Smith's affidavit, he was not aware that any of Karima's mail was treated as non-privileged after November 25, 2003. Had Smith known that mailroom employees were treating Karima's mail as non-privileged, he would have corrected the situation.

In contrast, Al-Amin testified that legal mail from Karima continued to be opened outside his presence even after Head's November 25, 2003 grievance response. Al-Amin points to thirteen envelopes (attached to his complaint) mailed between June 28, 2004 and February 8, 2005 as legal mail opened outside his presence.[9] Further, in 2005, Karima

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mailroom staff that letters from Karima should be treated as regular mail.

[8] As the warden's designee under the mail policy, Martin was permitted to inspect Al-Amin's nonprivileged mail outside his presence.

[9] Al-Amin's complaint describes a second grievance ("No. 517-04-2332"), filed on October 14, 2004, which alleged that his privileged mail was still being opened and read outside of his presence. Warden Smith denied the grievance, and Al-Amin appealed. On December 1, 2004, Head informed Al-Amin that every effort was being made by mailroom staff to ensure that all legal mail was opened in the presence of the prisoner to whom it

(Continued on following page)

questioned Warden Smith about the continual opening of Al-Amin's legal mail. Smith replied that the opened mail from Karima was mail from her home of a personal nature. Karima informed Smith that all communications had been duly marked as "legal mail" and that she had not sent any mail from her home.

E. Al-Amin's Complaint

On March 21, 2005, Al-Amin filed a § 1983 complaint against Warden Smith and Martin in their individual capacities.[10] Attached to the complaint are photocopies of the thirteen envelopes between June 28, 2004 and February 8, 2005, which he alleges were improperly opened before reaching him.[11] The return address on each envelope is Karima's law office address and each is marked "legal mail." Four of the envelopes are also marked "attorney-client privilege."

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was addressed. The record contains no other evidence of this grievance.

[10] Al-Amin also sued defendants in their official capacities. In a July 18, 2005 order, the district court dismissed the official capacity claims as barred by the Eleventh Amendment. Al-Amin did not appeal this ruling, and thus we do not address his official capacity claims.

[11] Although there are fourteen envelopes, the parties refer to thirteen envelopes and we assume that they are dropping the one that is not legible.

Al-Amin's lawsuit seeks damages for only these thirteen letters.[12]

However, as background, Al-Amin's complaint stresses that during 2003 defendants had previously opened and read his attorney mail and been told to stop. According to Al-Amin's complaint, during 2003, Martin knowingly violated the DOC policy by instructing mailroom staff to open and read his legal mail outside his presence and GSP staff continued to do so even after Head's November 25, 2003 directive to treat Al-Amin's legal mail as privileged.

Al-Amin's complaint further alleges that Martin's authorizing of GSP mailroom staff to continue to open and read all of Al-Amin's privileged mail from Karima violated not only the DOC mail policy but also his constitutional rights. As to Warden Smith, the complaint alleges that, after Al-Amin's grievance was sustained, Smith knowingly failed to take corrective actions to ensure that Al-Amin's legal mail was not opened and read outside Al-Amin's presence, thereby violating his constitutional rights.

Al-Amin requests: (1) a declaratory judgment that defendants violated his constitutional rights; (2)

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[12] At his deposition, Al-Amin testified that after his complaint was filed, he received a piece of "legal" mail that was opened. On August 23, 2005, Officer Oliver took a letter from Karima to Al-Amin and stated that "it's already been opened." There is no testimony about what was on the front of the envelope, and Al-Amin has not filed this envelope in the record.

a permanent injunction ordering defendants to open his attorney mail only in his presence; (3) nominal and punitive damages; and (4) attorney's fees.[13]

F. Cross Motions for Summary Judgment

Defendants' motion for summary judgment argued that Al-Amin had shown no constitutional violation because Al-Amin: (1) did not list his wife on his attorney-of-record list and therefore his wife's mail was not privileged; and (2) did not articulate any actual injury caused by his alleged denial of court access. Defendants also argued that they were entitled to qualified immunity because they had no fair warning that their actions were unconstitutional.

In response, Al-Amin moved for summary judgment, arguing that: (1) defendants knew that Karima's

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[13] Although Al-Amin initially alleged that GSP staff *read* his attorney mail, Al-Amin also claimed that even if his mail was not *read,* he has a constitutional right to have his properly marked attorney mail *opened only in his presence,* apart from his right to receive unread attorney mail. The district court's orders on appeal addressed only Al-Amin's "mail opening" claim and its limiting its orders to Al-Amin's "mail opening" claim is not challenged before this Court.

Indeed, defendants do not contend that they are entitled to read Al-Amin's attorney mail. Nor do defendants deny that the law is well established that Al-Amin has a constitutional right that precludes them from reading Al-Amin's attorney mail. Instead, defendants contend that there was no well-established constitutional right requiring them to open attorney mail only in Al-Amin's presence. For these reasons, we address only Al-Amin's "mail opening" claim.

letters were privileged attorney mail from the envelopes themselves, which bore her law firm address and were labeled "legal mail"; (2) the DOC mail policy did not require Al-Amin to list his attorneys; and (3) even after Head's November 25, 2003 instruction not to open legal mail from Karima outside Al-Amin's presence, defendants continued to do so.

G. District Court's Two Orders

In an August 23, 2006 order, the district court denied the parties' cross motions for summary judgment as to Al-Amin's attorney mail claim.[14] The district court concluded the law was clearly established in 2003-04 that prison officials violate an inmate's First Amendment rights by opening properly marked legal mail outside the inmate's presence.[15] However, the district court determined that material

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[14] Al-Amin's complaint also contains a retaliation claim, which the district court dismissed without prejudice due to Al-Amin's failure to exhaust his administrative remedies on that claim. This appeal does not involve Al-Amin's retaliation claim.

[15] The district court noted that for mail to be treated as privileged legal mail, the state may require: (1) that legal mail be specially marked as originating from an attorney with the attorney's name and address; and (2) that an attorney desiring to communicate with a prisoner first identify herself and her client to prison officials to assure that letters marked privileged are actually from members of the bar. *See Wolff v. McDonnell*, 418 U.S. 539, 576-77, 94 S. Ct. 2963, 2985 (1974). The district court observed that DOC's SOP IIB04-0001 required that attorney mail be specially marked, but did not require an attorney to first identify herself and her client to prison officials.

fact issues existed as to whether the mail in question met the standards for privileged mail, whether prison officials required Al-Amin to list his attorneys, and whether Al-Amin suffered actual injury.

The district court's September 19, 2006 order denied defendants' motion for reconsideration, concluding that Al-Amin's complaint stated claims for violations of his rights to access to the courts and free speech. Defendants appeal both orders.

II. QUALIFIED IMMUNITY

On appeal, Al-Amin does not challenge the DOC policy that permits GSP employees to open incoming attorney mail in his presence. Rather, Al-Amin's claims are that defendants, in repeatedly opening his attorney mail outside his presence, violated not only that prison policy but also his constitutional rights to access to the courts and free speech. In this interlocutory appeal, the sole question is whether defendants are entitled to qualified immunity on Al-Amin's access-to-courts and free speech claims.

"Qualified immunity offers complete protection for government officials sued in their individual capacities if their conduct 'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Vinyard v. Wilson,* 311 F.3d 1340, 1346 (11th Cir. 2002) (citation omitted). To receive qualified immunity, a government official must first establish that he was acting within his discretionary authority. *McClish v. Nugent,*

483 F.3d 1231, 1237 (11th Cir. 2007); *Vinyard,* 311 F.3d at 1346. Here, Warden Smith and Martin were acting within their discretionary authority as to inmates' mail.

Once a government official establishes that he was acting within the scope of his discretionary authority, the burden shifts to the plaintiff. *McClish,* 483 F.3d at 1237; *Vinyard,* 311 F.3d at 1346. The Supreme Court has set forth a two-part test for qualified immunity. *Vinyard,* 311 F.3d at 1346 (citing *Hope v. Pelzer,* 536 U.S. 730, 122 S. Ct. 2508 (2002)). First, a court must undertake the threshold inquiry of whether the plaintiff's allegations, if true, establish a constitutional violation. *Id.* If a constitutional right would have been violated under the plaintiff's version of the facts, the next question is whether the constitutional right was clearly established. *Id.* The right must have been clearly established at the time of the alleged violation. *Id.* at 1349. Further, "[t]he relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier v. Katz,* 533 U.S. 194, 202, 121 S. Ct. 2151, 2156 (2001). Stated another way, "the salient question ... is whether the state of the law [at the time of the events in question] gave respondents fair warning that their alleged treatment of [the plaintiff] was unconstitutional." *Hope,* 536 U.S. at 741, 122 S. Ct. at 2516.

We first analyze whether Al-Amin's claims establish any constitutional violations.

III. AL-AMIN'S ACCESS-TO-COURTS CLAIM

A. Al-Amin's Version of Facts

Defendants argue that even if opening attorney mail outside an inmate's presence violates the Constitution, Al-Amin has not shown a constitutional violation because he never listed Karima as one of his attorneys and there was no evidence that Karima was Al-Amin's attorney. The problem for defendants is that in qualified immunity cases on interlocutory appeal, we accept the plaintiff's version of the facts and resolve only legal questions. *See Andujar v. Rodriguez,* 486 F.3d 1199, 1202 (11th Cir.), *cert. denied,* 128 S. Ct. 385 (2007); *Robinson v. Arrugueta,* 415 F.3d 1252, 1257 (11th Cir. 2005); *Vinyard,* 311 F.3d at 1346 n.7.

Al-Amin testified that Karima was his attorney. All thirteen envelopes in issue were sent after Head's November 15, 2003 response sustaining Al-Amin's grievance about GSP improperly opening his attorney mail from Karima. Although Karima was not on the May 2002 list, defendants knew, at least by November 25, 2003, that Karima was Al-Amin's attorney and that her properly marked attorney mail should be opened only in Al-Amin's presence. After receiving Head's response, defendants even gave instructions that Karima's legal mail should be opened only in Al-Amin's presence. The thirteen envelopes were all marked "legal mail" with Karima's full name and law office address on them, but were opened before

reaching Al-Amin.[16] Accordingly, we reject defendants' argument that Al-Amin has not shown constitutional violations on this basis.

B. Clearly Established Law

Defendants alternatively argue that the law was not clearly established that opening attorney mail outside an inmate's presence violates his constitutional right to access to the courts.

The Supreme Court has long held that "prisoners have a constitutional right of access to the courts." *Bounds v. Smith,* 430 U.S. 817, 821, 97 S. Ct. 1491, 1494 (1977).[17] Further, under our binding precedent, a prisoner's constitutional right of access to the courts requires that incoming legal mail from his attorneys,

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[16] While Martin contends that the envelopes may have been opened by "a mail sorter," the envelopes were undisputedly opened before reaching Al-Amin. Martin's affidavit uses the term "mail sorter" without explanation of whether that is a person or a machine. In either event, Al-Amin claims that his attorney mail was illegally opened outside his presence even after his grievance was sustained and defendants were instructed not to do so.

[17] The majority opinion in *Bounds* did not identify the constitutional provision underlying that right. *See Bounds,* 430 U.S. at 833-34, 97 S. Ct. at 1501 ("The [majority opinion] leaves us unenlightened as to the source of the 'right of access to the courts.'") (Burger, C.J., dissenting). Recently we indicated that the constitutional right of access to the courts is "grounded in the First Amendment, the Article IV Privileges and Immunities Clause, the Fifth Amendment, and/or the Fourteenth Amendment." *Chappell v. Rich,* 340 F.3d 1279, 1282 (11th Cir. 2003).

properly marked as such, may be opened only in the inmate's presence and only to inspect for contraband. *See Taylor v. Sterrett,* 532 F.2d 462 (5th Cir. 1976); *Guajardo v. Estelle,* 580 F.2d 748 (5th Cir. 1978).[18]

Defendants argue that *Taylor* and *Guajardo* are no longer good law due to the Supreme Court's intervening decision in *Turner v. Safley,* 482 U.S. 78, 107 S. Ct. 2254 (1987). Defendants point out that the Fifth Circuit, post-*Turner,* rejected the holdings of *Taylor* and *Guajardo* and argue that we should do the same. *See Brewer v. Wilkinson,* 3 F.3d 816 (5th Cir. 1993). Al-Amin responds that post-*Turner,* several other circuits have concluded that inmates have constitutionally protected rights to have properly marked attorney mail opened only in their presence. We review these cases in detail in order to explain why *Taylor* and *Guajardo*'s holdings – that a prisoner has constitutional rights to have his attorney mail opened only in his presence – are not changed by *Turner,* and remain well-established law in this circuit. We begin with *Taylor* and *Guajardo.*

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[18] *See also Barlow v. Amiss,* 477 F.2d 896, 898 (5th Cir. 1973) (stating that "[w]hile the control of prison mail is a matter of internal prison administration with which the federal courts are loath to interfere, the denial of free and unfettered communication between inmates . . . and attorneys may constitute a denial of federal constitutional rights") (citations omitted). In *Bonner v. City of Prichard,* 661 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*), this Court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to close of business on September 30, 1981.

C. *Taylor* and *Guajardo*

In *Taylor*, prison officials challenged a restriction, imposed by a district court order, forbidding them from opening an inmate's attorney mail except in that inmate's presence. *Taylor*, 532 F.2d at 464. The *Taylor* Court concluded that an inmate's constitutional right of access to the courts "supports that portion of the district court's order requiring that incoming prisoner mail from . . . attorneys . . . be opened only in the presence of the inmate." *Id.* at 475.[19]

In reaching this result, the *Taylor* Court weighed "the burden on the prisoner's access to the courts against the legitimate governmental interest of prison security." *Id.* at 472. The Court noted that "[b]efore procedures that impede a prisoner's access

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[19] Although *Taylor* also addressed other types of mail between inmates and prosecuting attorneys, courts, and probation/parole officers, we focus on only attorney mail in this case.

Additionally, prison officials in *Taylor* challenged the district court's ruling that attorney mail could not be opened, even in an inmate's presence, unless "there is a reasonable possibility that contraband is included in the mail. . . . " *Id.* at 464. We upheld the requirement of opening only in the inmate's presence as constitutionally compelled, but rejected the additional restriction that there must be a "reasonable possibility" of contraband before opening the mail to check for contraband. *Id.* at 469. The *Taylor* Court noted, however, that "[t]his inspection is limited to locating contraband. It does not entail reading an enclosed letter. It should be emphasized that this requirement does not preclude a 'probable cause' search or seizure of the envelope and its contents in the appropriate circumstances." *Id.* at 475.

to the courts may be constitutionally validated, it must be clear that the state's substantial interests cannot be protected by less restrictive means." *Id.* The government interest was "jail security as affected by the introduction of contraband into the jail and by the communication of escape plans or other . . . criminal activities." *Id.* at 473. The Court identified the "basic prisoner interest" in "uninhibited communication with attorneys." *Id.* at 475.

The *Taylor* Court concluded that "[a]llowing the inspection of incoming inmate mail from [attorneys] only in the presence of the inmate accomplishes a compromise of [those] two important interests without sacrificing either of them." *Id.* at 477.[20] "Prisoners are not inhibited in using this traditional communication medium to pursue their defense or to present their legal grievance. And jail officials are not denied

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[20] The *Taylor* Court looked to the Supreme Court's guidance from *Wolff v. McDonnell*, 418 U.S. 539, 94 S. Ct. 2963 (1974). However, because of the procedural posture in *Wolff*, the Supreme Court did not actually decide the issue of whether opening a prisoner's legal mail in the prisoner's presence was constitutionally required. Instead, in *Wolff*, the petitioner-prison officials agreed that they could not open and read incoming legal mail but argued that they "may open all letters from attorneys as long as it is done in the presence of the prisoners." *Wolff*, 418 U.S. at 575, 94 S. Ct. at 2984. In agreeing that opening legal mail in a prisoner's presence was permissible, the Supreme Court concluded that "petitioners, by acceding to a rule whereby the inmate is present when mail from attorneys is inspected, have done all, and perhaps even more, than the Constitution requires." *Id.* at 577, 94 S. Ct. at 2985.

the use of any mail procedure shown to be essential to jail security." *Id.* In other words, the inmate's presence insures that attorney mail will not be read and prison officials are assured that the mail contains no contraband.[21]

Similarly, in *Guajardo,* prison officials appealed a district court's ruling that incoming attorney mail could be opened and inspected for contraband only in the inmate's presence. *Guajardo,* 580 F.2d at 757. The *Guajardo* Court followed *Taylor*'s holding that "incoming [legal] mail could be opened only to inspect for contraband and in the presence of the inmate recipient." *Id.* at 758. The Court noted that *Taylor*'s requirement "derived from the nature of the correspondence involved" and that "[t]he protection afforded extends only to attorneys representing or being asked to represent an inmate in either a criminal or civil matter." *Id.* at 758. The Court dismissed concerns about inmates using attorneys to violate prison rules because attorneys are bound by professional standards and would face criminal sanctions.

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[21] The *Taylor* Court, in holding that legal mail must be opened in the presence of the inmate, stated that "[c]onsistent with [*Wolff*], we think it permissible that prison officials require attorneys wishing to correspond confidentially with prisoners first to identify themselves by means of a signed letter." *Id.* at 475 n.20. The Court identified a procedure ordered by a district court as "one approach to this problem. There, an attorney was required to enclose confidential writings in a sealed envelope to be mailed to the prison inside a larger envelope containing a signed letter." *Id.* (discussing *Marsh v. Moore,* 325 F. Supp. 392 (D. Mass. 1971)).

Id. at 758-59. The Court concluded that "[t]he danger to prison security, order and rehabilitation does not outweigh the right of access to the courts." *Id.* at 759.

D. *Turner v. Safley*

We would end our clearly established law analysis with *Taylor* and *Guajardo* but for the intervening Supreme Court decision in *Turner,* which adopted a more deferential, "reasonably related" test for determining whether prison practices impermissibly burden inmates' constitutional rights.

Although the prison regulations at issue in *Turner* involved inmate-to-inmate correspondence and inmate marriages, *Turner* is important because it held that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Turner,* 482 U.S. at 89, 107 S. Ct. at 2261; *see Van Poyck v. Singletary,* 106 F.3d 1558, 1560 (11th Cir. 1997) (stating *Turner* allows "prison rules to burden inmates' constitutional rights when reasonably related to a legitimate penological interest").[22]

The *Turner* Court identified four factors in determining the reasonableness of a prison regulation: (1) a "'valid, rational connection' between the prison

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[22] The Supreme Court upheld the restrictions on inmate-to-inmate correspondence, but invalidated the restrictions on inmate marriages. *Id.* at 91, 107 S. Ct. at 2262-63.

regulation and the legitimate governmental interest"; (2) "whether there are alternative means of exercising the right that remain open to prison inmates"; (3) the impact that accommodation of the asserted constitutional right will have on guards, inmates, and the allocation of prison resources; and (4) the "absence of ready alternatives" to the regulation. *Id.* at 89-90, 107 S. Ct. at 2262.

Post-*Turner,* this Court has accorded "wide-ranging" and "substantial" deference to prisoner administrators in their execution of policies and practices that they consider necessary to preserve internal order and discipline and to maintain institutional security. *See Bass v. Perrin,* 170 F.3d 1312, 1319 (11th Cir. 1999); *Lawson v. Singletary,* 85 F.3d 502, 509-10 (11th Cir. 1996). Such deference is justified because of "the complexity of prison management, the fact that responsibility therefor is necessarily vested in prison officials, and the fact that courts are ill-equipped to deal with such problems." *Lawson,* 85 F.3d at 510. Before we apply *Turner*'s factors to the mail-opening issue here, we review the post-*Turner* split in other circuits about this issue.

E. Other Circuits Post-*Turner*

Subsequent to *Turner,* the Fifth Circuit reconsidered *Taylor* and *Guajardo* and rejected their holdings under *Turner*'s "reasonably related" test. *See Brewer,* 3 F.3d at 825. The plaintiff-inmates in *Brewer* complained that their legal mail was opened outside their

presence, despite a prison policy requiring otherwise.[23] *Brewer* involved broad "legal mail" which the Fifth Circuit described as "legal mail from various courts, attorneys, and government officials." *Id.* at 818.

The Fifth Circuit acknowledged prisoners' "constitutionally protected right of access to the courts" but concluded that "what we once recognized in [*Taylor*] as being 'compelled' by prisoners' constitutional rights – i.e., that a prisoner's incoming legal mail be opened and inspected only in the prisoner's presence – is no longer the case in light of *Turner* and *Thornburgh*."[24] *Id.* at 820, 825 (citation omitted). The Fifth Circuit stated that *Taylor*'s requirements of the least restrictive means and a substantial or important government interest "appear[ed] to have been modified" by *Turner*'s "instruction that when a prison practice impinges on inmates' constitutional rights, whatever those rights might be, such a practice is valid if it is 'reasonably related to legitimate penological interests.'" *Id.* at 823-25. The Fifth Circuit

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[23] The Texas Department of Criminal Justice had a policy whereby "Incoming Special Correspondence from a specific named official will be delivered to the inmate sealed and uninspected. Incoming Special Correspondence not from a specific named official may be opened and inspected for contraband only. The inspection shall be in the inmate's presence." *Id.* at 818 n.2.

[24] In *Thornburgh v. Abbott*, the Supreme Court applied *Turner* to a prison's regulation of incoming mail in the form of subscription publications. 490 U.S. 401, 407-19, 109 S. Ct. 1874, 1878-85 (1989).

noted that the prisoners did not allege "that their mail has been censored" and "they concede that such mail was opened and inspected for the 'legitimate penological objective' of prison security, i.e., to detect contraband." *Id.* at 825. The Fifth Circuit concluded that "the violation of the prison regulation requiring that a prisoner be present when his incoming legal mail is opened and inspected is not a violation of a prisoner's constitutional rights." *Id.* at 825.

In contrast, several other circuits post-*Turner* have concluded that opening properly marked attorney mail outside a prisoner's presence infringes the constitutional right to access to the courts. *See Sallier v. Brooks,* 343 F.3d 868, 877-78 (6th Cir. 2003) (concluding that no penological interest or security concern justifies opening attorney mail outside prisoner's presence when prisoner requested otherwise); *Bieregu v. Reno,* 59 F.3d 1445, 1458 (3d Cir. 1995) (disagreeing with Fifth Circuit's *Brewer,* and concluding the pattern and practice of opening inmate's properly marked incoming "court mail"[25] outside his presence fails the *Turner* reasonableness standard and violates inmate's rights to free speech and access to courts) (*abrogated in part on other grounds by Lewis v. Casey,* 518 U.S. 343, 116 S. Ct. 2174 (1996));[26] *see also Kaufman v.*

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[25] In *Bieregu,* "court mail" was described as "correspondence between an inmate and a state or federal judge, clerk's office, or other courthouse address." 59 F.3d at 1449.

[26] *See infra* notes 32-33. *Bieregu*'s holding that a prisoner is not required to show actual injury in an access-to-courts claim

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McCaughtry, 419 F.3d 678, 686 (7th Cir. 2005) (stating, "when a prison receives a letter for an inmate that is marked with an attorney's name and a warning that the letter is legal mail, officials potentially violate the inmate's rights if they open the letter outside of the inmate's presence"); *Davis v. Goord,* 320 F.3d 346, 351-52 (2d Cir. 2003) (noting, "[i]nterference with legal mail implicates a prison inmate's rights to access to the courts" but concluding two incidents of mail interference "are insufficient to state a claim for denial of access to the courts because [the inmate] has not alleged that the interference with his mail either constituted an ongoing practice of unjustified censorship or caused him to miss court deadlines or in any way prejudiced his legal actions"); *Powells v. Minnehaha County Sheriff Dep't,* 198 F.3d 711, 712 (8th Cir. 1999) (concluding inmate stated constitutional claim based on officers opening legal mail when he was not present).[27]

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was later overruled by *Casey. See Oliver v. Fauver,* 118 F.3d 175, 177-78 (3d Cir. 1997). However, the Third Circuit in *Jones v. Brown* expressly reaffirmed *Bieregu*'s holding that a pattern and practice of opening an inmate's legal mail outside his presence violates his constitutional rights. *See Jones,* 461 F.3d 353, 358-59 (3d Cir. 2006), *cert. denied,* 127 S. Ct. 1822 (2007).

[27] Pre-*Turner,* several circuits concluded that inmates have constitutionally protected rights to have properly marked attorney mail opened only in their presence. *See Washington v. James,* 782 F.2d 1134, 1139-40 (2d Cir. 1986) (concluding that allegation that prison officials repeatedly opened outgoing attorney mail states a First Amendment claim); *Jensen v. Klecker,* 648 F.2d 1179, 1182-83 (8th Cir. 1981) (concluding that

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The Third Circuit in *Bieregu* noted that although reading legal mail would infringe the right of access more than simply opening and inspecting it, "the only way to ensure that mail is not read when opened, and thus to vindicate the right to access, is to require that it be done in the presence of the inmate to whom it is addressed." 59 F.3d at 1456 (citing *Wolff v. McDonnell,* 418 U.S. 539, 576-77, 94 S. Ct. 2963, 2984-85 (1974)). Although *Bieregu* involved court mail, the Third Circuit emphasized that "interference with attorney mail probably infringes the right of court access even more than interference with court mail. . . . Of all communications, attorney mail is the most sacrosanct." *Id.* The Third Circuit pointed out that providing inmates with confidential reliable means of communication with their attorneys about

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allegation that prison officials deliberately and repeatedly opened attorney mail outside prisoner's presence defeated defendants' motion for summary judgment); *Ramos v. Lamm,* 639 F.2d 559, 582 (10th Cir. 1980) (opening outgoing attorney mail outside inmate's presence violates First Amendment); *Smith v. Robbins,* 454 F.2d 696, 697 (1st Cir. 1972) (affirming district court order that attorney mail may not be opened in prisoner's absence because "[i]f the prisoner is present, he can see that the letter is not being read" and noting that otherwise, the resulting fear that mail will be read "may chill communications between the prisoner and his counsel"); *cf. Smith v. Maschner,* 899 F.2d 940, 944 (10th Cir. 1990) (concluding that where defendants opened one piece of prisoner's constitutionally protected legal mail by accident, "[s]uch an isolated incident, without any evidence of improper motive or resulting interference with Smith's right to counsel or to access to the courts, does not give rise to a constitutional violation").

grievances "releases tension in the prisons and itself advances the state interest in maintaining institutional order and security." *Id.* at 1457. The benefits of such a "safety valve" advances, rather than frustrates, state interests.

The Third Circuit also concluded that opening legal mail in an inmate's presence "places no burden at all on guards, prisoners, and the allocation of prison resources: it is what the [prison] regulations have required since 1985." *Id.* at 1458. When opening mail in the prisoner's presence, the prison can check for contraband then, which satisfies the state's security interest. The Third Circuit, however, was "careful to distinguish between a single, inadvertent opening of properly marked legal mail outside an inmate's presence and a pattern or practice of such actions." *Id.* "The former may not infringe a prisoner's right to free speech, nor his right to court access absent a showing of actual injury." *Id.*[28]

The Sixth Circuit also recently concluded that no penological interest or security concern justifies opening attorney mail outside a prisoner's presence when the prisoner specifically requested otherwise, and that the practice violates the prisoner's First

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[28] The Third Circuit acknowledged that its conclusion differed from the Fifth Circuit's *Brewer* decision, but that its own conclusion "comports with the results reached by the majority of courts of appeals to consider these precise or similar issues." *Bieregu*, 59 F.3d at 1458.

Amendment rights.[29] *See Sallier,* 343 F.3d at 877-78.[30] Although not explicitly citing *Turner* itself, the Sixth Circuit articulated *Turner*'s reasonably related standard and cited to *Muhammad v. Pitcher,* 35 F.3d 1081 (6th Cir. 1994), which did use the *Turner* factors. *Sallier,* 343 F.3d at 873, 877; *see Muhammad,* 35 F.3d at 1084-86 (analyzing procedure of opening inmate's incoming mail from state attorney general outside of his presence and concluding, "[a]ll four of the *Turner* factors indicate that the policy does not pass muster" under the First Amendment right).

F. *Turner* Did Not Change Our Well-Established Law

Applying *Turner*'s factors to this case, we conclude that our well-established law in *Taylor* and *Guajardo* – that inmates have a constitutionally protected right to have their properly marked attorney mail opened in

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[29] The Sixth Circuit noted that "[n]ot all mail that a prisoner receives from a legal source will implicate constitutionally protected legal mail rights," but when it does, "we must balance the interest of prison security against the possibility of tampering that could unjustifiably chill the prisoner's right of access to the courts or impair the right to be represented by counsel." *Sallier,* 343 F.3d at 874.

[30] In *Sallier,* the prison system's policy required that a prisoner make a written request that his legal mail be opened only in his presence. *Id.* at 874-75. The Sixth Circuit had previously found that this opt-in policy was sound. *Id.* at 874 (citing *Knop v. Johnson,* 977 F.2d 996, 1012 (6th Cir. 1992)). Al-Amin made such a request.

their presence – is not changed by *Turner* and remains valid, well-established law. As to the first *Turner* factor, a "valid, rational connection" between the prison practice and a legitimate governmental interest, we fully recognize that the government has a strong interest in prison security. However, defendants do not dispute that attorneys are unlikely to send contraband, nor have they articulated a legitimate security interest in opening properly marked attorney mail outside Al-Amin's presence. Indeed, defendants can readily check for contraband if attorney mail is opened in the inmate's presence, and the DOC's own policy provides for opening attorney mail in the inmate's presence. Assuring the inmate of the confidentiality of inmate-attorney mail by opening such mail only in the inmate's presence actually advances the state's interest in promoting institutional order and security. *See Bieregu,* 59 F.3d at 1457. The first *Turner* factor thus favors Al-Amin.

As to the second *Turner* factor, Al-Amin has no other means of exercising his access-to-courts right where that access depends on confidentially communicating with his attorneys. Even if prison officials vow to open but not read attorney mail, courts have noted the inmates' lack of trust in that vow and fear that their attorney mail will be read. Opening attorney mail only in the inmate's presence ensures that the inmate's correspondence with his attorney is not inhibited or chilled by his fear that this correspondence may be read by prison officials. *See, e.g., Taylor,* 532 F.2d at 476 (citing *Robbins,* 454 F.2d at 697).

As to the third factor, there is no showing that opening attorney mail in an inmate's presence burdens guards, prisoners, or the allocation of prison resources; as noted above, DOC policy already requires opening attorney mail in an inmate's presence. While opening all prison mail in an inmate's presence would pose an impermissible burden, we conclude properly marked attorney mail does not. As to the fourth factor, opening an inmate's attorney mail in his presence itself is the easy alternative; it "fully accommodates the prisoner's rights at *de minimis* cost to valid penological interests." *Turner,* 482 U.S. at 91, 107 S. Ct. at 2262. Thus, all four *Turner* factors weigh in Al-Amin's favor and *Turner* does not undermine *Taylor*'s or *Guajardo*'s holding.

Both parties cite our post-*Turner* decision in *Lemon v. Dugger,* 931 F.2d 1465 (11th Cir. 1991), but *Lemon* was a reading-attorney-mail case.[31] In contrast, Al-Amin claims a constitutional right to receive attorney mail unopened or to have attorney mail opened only in his presence, apart from his constitutional right to receive unread attorney mail. Thus, *Taylor* and *Guajardo,* binding precedent from our

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[31] In *Lemon,* defendant-prison officials did not contest the prisoner's constitutional right not to have his mail read, but claimed that they had probable cause to read the mail and that this probable cause trumped Lemon's constitutional right not to have his mail read. *Id.* at 1468. In rejecting this claim, *Lemon* relied on *Taylor*'s holding "that it was a violation of an inmate's constitutional rights for the prison officials *to read* legal mail." *Id.* at 1467 (emphasis added).

predecessor court, speak more directly to the mail-opening issue. Nonetheless, *Lemon*'s reasoning does support our conclusion that the *Turner* factors favor Al-Amin. Although not discussing *Turner*, the *Lemon* Court stressed that "'[t]he basic prisoner interest is an uninhibited communication with attorneys'" and that "'[p]risoners have a vital need to communicate effectively with [their attorneys].'" *Id.* at 1467 (quoting *Taylor*, 532 F.2d at 475) (third alteration in original). The *Lemon* Court shared *Taylor*'s concern that "the essential role of postal communication cannot be ignored" because the fact of incarceration sharply restricts an inmate's means of communication with his attorney. *Id.* The Court noted that opening mail in an inmate's presence "insures that prison officials *will not read the mail*" and thus does not chill attorney-inmate communication. *Id.* (quoting *Wolff*, 418 U.S. at 577, 94 S. Ct. at 2985).

Given this Court's precedent in *Taylor*, *Guajardo*, and *Lemon*, we conclude that: (1) a reasonable official would have known in 2004-05 that opening properly marked, incoming attorney mail outside the inmate's presence is unlawful and unconstitutional; and (2) *Turner* did not change our well-established law in that regard. Al-Amin would be home free on his access-to-courts claim but for the Supreme Court's actual injury decision in *Casey*.

G. Actual Injury Requirement

Subsequent to *Taylor, Guajardo*, and *Lemon,* the Supreme Court clarified that "actual injury" is a constitutional prerequisite to an inmate's access-to-courts claim. *See Casey,* 518 U.S. 343, at 349, 116 S. Ct. 2174, 2179; *Barbour v. Haley,* 471 F.3d 1222, 1225 (11th Cir. 2006) (citing *Casey* and stating, "in order to assert a claim arising from the denial of meaningful access to the courts, an inmate must first establish an actual injury"), *cert. denied,* 127 S. Ct. 2996 (2007);[32] *Perrin,* 170 F.3d at 1320 n.13; *Wilson v. Blankenship,* 163 F.3d 1284, 1290 (11th Cir. 1998); *Bass v. Singletary,* 143 F.3d 1442, 1445 (11th Cir. 1998). "[P]rison officials' actions that allegedly violate an inmate's right of access to the courts must have impeded the inmate's pursuit of a nonfrivolous, post-conviction claim or civil rights action." *Wilson,* 163

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[32] The Supreme Court in *Casey* explained that the actual injury requirement in access-to-courts cases "derives ultimately from the doctrine of standing, a constitutional principle that prevents courts of law from undertaking tasks assigned to the political branches." *Casey,* 518 U.S. at 349, 116 S. Ct. at 2179. The Supreme Court explained that "[i]t is the role of courts to provide relief to claimants . . . who have suffered, or will imminently suffer, actual harm; it is not the role of courts, but that of the political branches, to shape the institutions of government in such fashion as to comply with the laws and the Constitution." *Id.* The Supreme Court added that "the distinction between the two roles would be obliterated if, to invoke intervention of the courts, no actual or imminent harm were needed, but merely the status of being subject to a governmental institution that was not organized or managed properly." *Id.* at 350, 116 S. Ct. at 2179.

F.3d at 1290; *accord Singletary,* 143 F.3d at 1445 (identifying the limited types of legal claims protected by the access-to-courts right as nonfrivolous appeals from a conviction, habeas petitions, or civil rights suits).[33]

In order to show actual injury, "a plaintiff must provide evidence of such deterrence, such as a denial or dismissal of a direct appeal, habeas petition, or civil rights case that results from actions of prison officials." *Wilson,* 163 F.3d at 1290-91; *see also Perrin,* 170 F.3d at 1320 n.13 (stating in an access-to-courts claim, "plaintiffs must show 'actual injury' – in other words, the plaintiffs must demonstrate that they had a legitimate claim that they were unable to pursue due to the prison's restrictions").

Here, Al-Amin has not alleged the requisite actual injury. Al-Amin stated that his wife handled all his cases, including a lawsuit, a habeas corpus petition (not yet filed), and the appeal of his criminal conviction. However, Al-Amin's testimony contains only a conclusory allegation that the mail opening

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[33] Other circuits also require actual injury to pursue a legal mail access-to-courts claim as a constitutional prerequisite under *Casey. See, e.g., Kaufman,* 419 F.3d at 686; *Simkins v. Bruce,* 406 F.3d 1239, 1243-44 (10th Cir. 2005); *Oliver,* 118 F.3d at 177-78. In *Bieregu,* 59 F.3d at 1455, the Third Circuit had held that a showing of actual injury was not required but in *Oliver,* it concluded that the Supreme Court's decision in *Casey* "ha[d] effectively overruled *Bieregu*" in that regard and that access-to-courts claims require a showing of actual injury. *Oliver,* 118 F.3d at 177-78.

compromised his cases and does not identify how any legal matters specifically were damaged. At most, Karima's affidavit states conclusorily that "[t]he violation of opening legal mail from my office over more than a three-year period has caused harm to the client/attorney privilege, confidentiality of legal matters, and in satisfying deadlines." Her affidavit provides no specific cases or claims being pursued, nor any deadlines missed, nor any effect on Al-Amin's legal claims. Because Al-Amin has not shown the requisite actual injury, the district court erred in denying defendants qualified immunity on Al-Amin's access-to-courts claim.

IV. FREE SPEECH CLAIM

A. Constitutional Violation

Al-Amin also contends that defendants' conduct – repeatedly opening his attorney mail outside his presence – inhibited, chilled, and interfered with his communication with his attorney and consequently violated his constitutional right to free speech. After review, we agree with the district court's conclusions that (1) Al-Amin's free speech claim is distinct from his access-to-courts claim; (2) defendants' conduct violated his right to free speech; and (3) he need not show any actual injury beyond the free speech violation itself to state a constitutional claim.

The First Amendment, as incorporated by the Fourteenth Amendment, prohibits states from "abridging the freedom of speech." U.S. Const. amend.

I. Mail is one medium of free speech, and the right to send and receive mail exists under the First Amendment. *See City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 427, 113 S. Ct. 1505, 1515-1516 (1993) ("A prohibition on the use of the mails is a significant restriction of First Amendment rights. We have noted that the United States may give up the Post Office when it sees fit, but while it carries it on the use of the mails is as much a part of free speech as the right to use our tongues.") (quoting *Blount v. Rizzi*, 400 U.S. 410, 416, 91 S. Ct. 423, 428 (1971)) (alteration and quotation marks omitted).

Further, it is well established that a prison inmate "retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system." *Pell v. Procunier*, 417 U.S. 817, 822, 94 S. Ct. 2800, 2804 (1974); *see Turner*, 482 U.S. at 95, 107 S. Ct. at 2265 (quoting this proposition from *Pell*); *Hudson v. Palmer*, 468 U.S. 517, 523, 104 S. Ct. 3194, 3198 (1984) (same); *Lawson*, 85 F.3d at 509 (same). As explained earlier, Al-Amin's use of the mail to communicate confidentially with attorneys about his cases is not inconsistent with his prisoner status or with legitimate penological objectives, but promotes the state's interest in institutional order and security. Indeed, given their incarceration and often distance from their attorneys, prisoners' use of the mail to communicate with their attorneys about their criminal cases may frequently be a more important free speech right than the use of their tongues.

Thus, we conclude that Al-Amin has a First Amendment free speech right to communicate with his attorneys by mail, separate and apart from his constitutional right to access to the courts.

The closer question here is whether defendants' conduct violated that constitutional right to free speech. This is not a case where defendants censored inmates' mail or refused to deliver mail. Instead, defendants opened Al-Amin's attorney mail outside his presence before delivering it to him. The issue thus is whether defendants' pattern and practice of opening (but not reading) Al-Amin's clearly marked attorney mail outside his presence sufficiently chills, inhibits, or interferes with Al-Amin's ability to speak, protest, and complain openly to his attorney so as to infringe his right to free speech.

In answering this question, we are persuaded by the Third Circuit's decision in *Jones v. Brown,* which concluded that a state prison's "pattern and practice" of opening attorney mail outside the inmate's presence "interferes with protected communications, strips those protected communications of their confidentiality, and accordingly impinges upon the inmate's right to freedom of speech." *Jones,* 461 F.3d at 359.[34] The Third Circuit in *Jones* reasoned that the

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[34] *Jones* examined New Jersey's prison policy allowing it to open incoming "legal correspondence" outside the prisoners' presence in order to protect the safety and security of its prisons by reducing the risk of anthrax contamination. 461 F.3d at 356. The Third Circuit concluded that, three years after September

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practice of opening attorney mail outside the inmate's presence "deprives the expression of confidentiality and chills the inmates' protected expression, regardless of the state's good-faith protestations that it does not, and will not, read the content of the communications." *Id.* The Third Circuit explained that "[t]his is so because 'the only way to ensure that mail is not read when opened . . . is to require that it be done in the presence of the inmate to whom it is addressed.'" *Id.* (quoting *Bieregu*, 59 F.3d at 1456 (citing *Wolff*, 418 U.S. at 576-77, 94 S. Ct. at 2984-85)); *see also Davis*, 320 F.3d at 351 ("Interference with legal mail implicates a prison inmate's rights to access to the courts and free speech as guaranteed by the First and Fourteenth Amendments to the U.S. Constitution.").

We also agree with the Third Circuit that the actual injury requirement applies to access-to-courts claims but not to free speech claims. *See Jones*, 461 F.3d at 359-60. Because the Supreme Court's *Casey* decision concerned an access-to-courts claim, the Third Circuit determined that "nothing in the reasoning of

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11 and the anthrax letters sent in October 2001, "there [wa]s no reasonable connection" between the opening policy and the asserted state interest, and, thus, the policy "d[id] not withstand constitutional scrutiny" under the *Turner* factors. *Id.* at 356, 363-64.

The "legal correspondence" in *Jones* included correspondence from courts and third parties, in addition to inmates' attorneys. Nothing herein rules as to legal mail in general because our case involves only attorney-client mail and our decision is necessarily limited to attorney-client mail only.

Casey . . . suggests that a prisoner . . . need allege any consequential injury stemming from [an alleged First Amendment] violation, aside from the violation itself." *Id.* at 359. The Third Circuit explained that while the provision of legal services and law libraries are means to ensure reasonable access to present constitutional claims to the courts, "protection of an inmate's freedom to engage in protected communications is a constitutional end in itself." *Id.* at 359-60.

In a similar vein, we have stated that "'[n]ominal damages are appropriate if a plaintiff establishes a violation of a fundamental constitutional right, even if he cannot prove actual injury sufficient to entitle him to compensatory damages.'" *KH Outdoor, LLC v. City of Trussville,* 465 F.3d 1256, 1260 (11th Cir. 2006) (quoting *Hughes v. Lott,* 350 F.3d 1157, 1162 (11th Cir. 2003)); *see also Carey v. Piphus,* 435 U.S. 247, 266-67, 98 S. Ct. 1042, 1053-54 (1978) (concluding that plaintiff could be compensated with nominal damages for procedural due process violations even absent proof of actual injury). We also have said that "nominal damages are . . . appropriate in the context of a First Amendment violation." *KH Outdoor,* 465 F.3d at 1261; *see also McNamara v. Moody,* 606 F.2d 621, 622, 625-26 (5th Cir. 1979) (affirming nominal damages award to prisoner whose freedom of speech right was violated when officials refused to mail letter to his girlfriend). Our precedent thus recognizes the award of nominal damages for violations of the

fundamental constitutional right to free speech absent any actual injury.[35]

Because Al-Amin has stated a free speech violation and because actual injury is not a constitutional prerequisite to a free speech claim, the only remaining question is whether Al-Amin's free speech right to have his attorney mail opened only in his presence was clearly established at the time of defendants' conduct.

B. Clearly Established Law

Defendants argue that they did not have "fair warning" that opening mail from Karima outside Al-Amin's presence was a free speech violation and that, therefore, they are entitled to qualified immunity on Al-Amin's free speech claim.[36] Defendants stress that our binding precedent in *Taylor, Guajardo*,

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[35] Because our interlocutory jurisdiction extends only to qualified immunity legal issues, we do not address defendants' claim, made in the district court, that the Prison Litigation Reform Act bars Al-Amin from seeking nominal and punitive damages. See discussion of these issues in *Smith v. Allen*, 502 F.3d 1255 (11th Cir. 2007).

[36] Defendants' argument relies in part on their contention that Karima's mail, although showing her law office address and marked "privileged, legal mail," was not attorney mail. As we have already explained, accepting the version of the facts most favorable to Al-Amin, by November 25, 2003, defendants knew that Karima was Al-Amin's attorney and that Karima's properly marked attorney mail should not be opened outside Al-Amin's presence.

and *Lemon* was based on the constitutional right to access the courts, not the right to free speech, and thus Al-Amin's free speech right was not clearly established. The question becomes whether, for qualified immunity purposes, defendants have "fair warning" when reasonable officials know that their precise conduct (opening an inmate's attorney mail outside his presence) is unlawful and a constitutional violation, but they do not know that it violates not only one constitutional right (the right to court access), but also a second constitutional right (the right to free speech).

The problem with defendants' argument is that the "clearly established" inquiry for qualified immunity focuses on the defendant's conduct and whether given a particular factual situation, a reasonable official would know his conduct was unlawful and unconstitutional. *See Hope,* 536 U.S. at 741, 122 S. Ct. at 2516; *Saucier,* 533 U.S. at 202, 121 S. Ct. at 2156. We have never required that, in order for an official to know his conduct is unlawful, a reasonable official must be able to cite by chapter and verse all of the constitutional bases that make his conduct unlawful. Rather, what courts have said is that a high degree of factual similarity with conduct previously held unlawful and unconstitutional is required to give a reasonable official fair and clear warning (or notice) that his particular conduct is unlawful and unconstitutional. *See, e.g., Hope,* 536 U.S. at 740-41, 122 S. Ct. at 2515-16; *Vinyard,* 311 F.3d at 1353.

In this case, exact factual identity exists between prior case law and defendants' factual conduct. Specifically, our precedent, as discussed above, clearly establishes that a prison official violates an inmate's constitutional rights when the official opens attorney mail outside the inmate's presence. *See Taylor,* 532 F.2d at 462; *Guajardo,* 580 F.2d at 748.[37] Thus, we conclude that defendants had fair and clear notice that opening Al-Amin's attorney mail outside his presence was unlawful and violated the Constitution. *See Vinyard,* 311 F.3d at 1350 ("'[I]f the law did not put the officer *on notice* that his conduct would be *clearly* unlawful, summary judgment based on qualified immunity is appropriate.'" (quoting *Saucier,* 533 U.S. at 202, 121 S. Ct. at 2156-57)). Accordingly, we affirm the district court's denial of qualified immunity on the free speech claim.[38]

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[37] In addition to our prior case law, the GSP's own regulations provide that an inmate's incoming attorney mail should be opened in the inmate's presence. While the regulations themselves do not constitute constitutional law, they further undermine any claim by defendants that they were unaware of their legal obligations in handling Al-Amin's mail.

[38] In their *reply* brief, defendants raise two additional arguments: (1) even if Al-Amin suffered constitutional violations, they still cannot be held liable because they did not personally participate in the illegal conduct that gave rise to the constitutional violations; and (2) there is insufficient evidence of a pattern, practice, or policy of opening attorney mail to establish supervisory liability. However, defendants neglected to make these arguments in their initial brief on appeal, and our precedent unambiguously provides that "[i]ssues that are not clearly outlined in an appellant's initial brief are deemed

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V. CONCLUSION

For these reasons, we reverse the district court's denial of qualified immunity on Al-Amin's access-to-courts claim and affirm on his free speech claim.

AFFIRMED IN PART AND REVERSED IN PART.

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abandoned." *Allison v. McGhan Med. Corp.*, 184 F.3d 1300, 1317 n.17 (11th Cir. 1999); *see also United States v. Levy*, 416 F.3d 1273, 1276 n.3 (11th Cir. 2005) (collecting cases and observing this Court "declines to consider issues raised for the first time in an appellant's reply brief").

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA STATESBORO DIVISION

JAMIL AL-AMIN, Plaintiff, vs. HUGH SMITH, Warden, and SANCHE MARTIN-JACKSON, individually, Defendants.	CIVIL ACTION NO.: CV605-025

ORDER

(Filed Aug. 23, 2006)

Plaintiff, an inmate currently incarcerated at Georgia State Prison in Reidsville, Georgia, filed an action pursuant to 42 U.S.C. § 1983 contesting certain conditions of his confinement. Defendants filed a Motion for Summary Judgment, and Plaintiff filed a Response and Motion for Summary Judgment. Defendants have responded. For the following reasons, Defendants' Motion for Summary Judgment is **GRANTED** in part and **DENIED** in part. Plaintiff's Motion for Summary Judgment is **DENIED**.

STATEMENT OF THE CASE

Plaintiff asserts that Defendants Jackson and Smith repeatedly opened privileged legal mail from his attorney outside of his presence. Plaintiff also

asserts that Defendants restricted his visitation and phone privileges in retaliation for his having filed grievances and a separate civil action against prison officials.

Defendants contend that the mail in question was not privileged legal mail under Standard Operating Procedure IIB04-0001 and assert that Plaintiff suffered no actual injury resulting from opening of his mail. Defendants also contend that Plaintiff's retaliation claim is barred by Plaintiff's failure to exhaust available administrative remedies. Further, Defendant Jackson alleges that she has never taken any action to restrict Plaintiff's visitation or telephone privileges and that she lacked any authority to do so. Defendants aver that they are entitled to qualified immunity. Finally, Defendants contend that some of Plaintiff's claims are barred because Plaintiff cannot show that he suffered any physical injury.

STANDARD OF DETERMINATION

Summary judgment should be granted if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving part[ies are] entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1223 (11th Cir. 2004). An issue of fact is "material" if it might affect the outcome of the case, and an issue of fact is "genuine" when it could cause a

rational trier of fact to find in favor of the nonmoving party. *Hickson Corp. v. Northern Crossarm Co., Inc.*, 357 1256, 1259-60 (11th Cir. 2004). The court must determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.* at 1260 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)).

The moving parties bear the burden of establishing that there is no genuine issue of material fact and that they are entitled to judgment as a matter of law. *Williamson Oil Co., Inc. v. Philip Morris USA*, 346 F.3d 1287, 1298 (11th Cir. 2003). Specifically, the moving parties must identify the portions of the record which establish that there are no genuine issues of material fact. *Hickson*, 357 F.3d at 1260 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)). When the nonmoving party would have the burden of proof at trial, the moving parties may discharge their burden by showing that the record lacks evidence to support the nonmoving party's case or that the nonmoving party would be unable to prove his case at trial. *Id.* In determining whether a summary judgment motion should be granted, a court must view the record and all reasonable inferences that can be drawn from the record in a light most favorable to the nonmoving party. *Acevado v. First Nat'l Bank*, 357 F. 3d 1244, 1247 (11th Cir. 2004).

DISCUSSION AND CITATION TO AUTHORITY

Defendants move for summary judgment based on four grounds. They assert that the mail in question was not privileged legal mail and that Plaintiff suffered no actual injury resulting from the opening of his mail. Defendants also allege that Plaintiff's retaliation claim fails because Plaintiff failed to exhaust his administrative remedies. Defendants further contend that they are entitled to qualified immunity. Finally, Defendants assert that some of Plaintiff's claims fail because Plaintiff cannot show any physical injury. Plaintiff also moves for summary judgment, refuting Defendants' allegations and incorporating all documents and factual allegations against Defendants that he has made throughout the course of this litigation.

I. Plaintiff's Legal Mail Claim

Defendants assert that Plaintiff's legal mail claim is without merit and that they are therefore entitled to summary judgment on that claim. Defendants allege that because the plaintiff's wife and attorney, Karima Al-Amin, was not previously listed with prison officials as an attorney for the plaintiff on any matters, and because the mail in question was allegedly personal in nature, the mail was not privileged legal mail subject to special requirements governing such mail.

Plaintiff contends that he was never asked by Defendants to list any attorneys of record. Plaintiff further contends that Standard Operating Procedure IIB04-0001 does not require such disclosure as a prerequisite to mail being deemed privileged legal mail. Plaintiff alleges that all communications from his wife have been clearly marked as "legal mail" and have been sent from her law office.

It is a violation of an inmate's First Amendment rights for prison officials to open privileged legal mail outside of the inmate's presence. *Lemon v. Dugger*, 931 F.2d 1465, 1467 (11th Cir. 1991). The rationale behind this constitutional requirement was noted by the Eleventh Circuit in *Lemon*, where the Court of Appeals stated that:

> The basic prisoner interest is an uninhibited communication with attorneys. Prisoners have a vital need to communicate effectively with [their attorneys]. This is to insure ultimately that the judicial proceedings brought against or initiated by prisoners are conducted fairly. Since the prisoner's means of communicating with these parties are restricted sharply by the fact of incarceration, the essential role of postal communication cannot be ignored.

Lemon at 467, citing *Taylor v. Sterrett*, 532 F.2d 462 (5th Cir. 1976) at 475.

It is permissible for a state to require that legal mail be specially marked as originating from an attorney with the attorney's name and address given

if it is to be treated as privileged mail. *Wolff v. McDonnell*, 418 U.S. 539, 576-77, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974). Additionally, a state may require that an attorney identify herself and her client to the prison officials. *Id.*

Here, however, the Standard Operating Procedure does not require that an attorney identify herself and her client to the prison officials, but merely that legal mail be specially marked as such. Standard Operating Procedure IIB04-0001 defines "inmate's attorney" as including "any attorney with whom the inmate has had, or is attempting to establish, an attorney client relationship . . . " and states that "(i)ncoming privileged correspondence shall be treated as privileged only if the name and official status of the sender appears commercially printed on the envelope." The evidence submitted by the Plaintiff creates a genuine issue of material fact regarding whether the mail in question met the standards required for mail to be privileged and, additionally, whether Plaintiff was required by prison officials to list his attorneys of record. This factual dispute is sufficient to defeat Plaintiff's Motion for Summary Judgment and Defendants' Motion for Summary Judgment on this issue. Therefore, neither Plaintiff nor Defendants are entitled to summary judgment on this issue.

Defendant also assert that Plaintiff has failed to articulate an actual injury as a result of his alleged constitutional violations and that they are entitled to summary judgment for that reason. The Supreme

Court has held that a claim for the denial of access to the court must have actually frustrated or impeded the inmate's efforts to pursue a nonfrivolous claim. *Lewis v. Casey*, 518 U.S. 343, 350, 116 S. Ct. 2174, 2179, 135 L. Ed. 2d 606 (1996). However, Plaintiff asserts that the alleged improper opening of Plaintiff's legal mail has caused harm to the attorney/client privilege, the confidentiality of legal matters, and in satisfying deadlines (Karima Al-Amin Affidavit, para. 8). Plaintiff has created a genuine issue of material fact as to whether actual injury exists. This factual dispute is sufficient to defeat Plaintiff's Motion for Summary Judgment and Defendants' Motion for Summary Judgment on this issue. Therefore, neither Plaintiff nor Defendants are entitled to summary judgment on this claim.

II. Failure to Exhaust

Defendants allege that Plaintiff did not exhaust his available administrative remedies with regard to his retaliation claim. Title 42, United States Code, Section 1997e(a), as amended by Section 803 of the Prison Litigation Reform Act of 1995 ("PLRA"), sets forth the procedures a prisoner must follow to access the courts. Section 1997e(a) provides:

> No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

In *Porter v. Nussie*, 534 U.S. 516, 122 S. Ct. 983, 152 L. Ed. 2d 12 (2002), The United States Supreme Court held that exhaustion of available administrative remedies is mandatory. *Porter*, 534 U.S. at 523, 122 S. Ct. at 987. Thus, even when the prisoner is seeking relief not provided for under the grievance process, exhaustion is still a prerequisite to his filing suit. *Id.* at 524, 122 S. Ct. at 988; *Booth v. Churner*, 532 U.S. 731, 732, 121 S. Ct. 1819, 1821, 149 L. Ed. 2d 958 (2001). It is not the role of the court to consider the adequacy or futility of the administrative remedies afforded to the inmate. *Higginbottom v. Carter*, 223 F.3d 1259, 1261 (11th Cir. 1998)). The court's focus should be on what remedies are available and whether the inmate pursued these remedies prior to filing suit. *See id.*

Defendants allege that the Georgia Department of Corrections adopted a three-step grievance process as outlined in Standard Operating Procedure IIB05-001. The first step requires an inmate to file an informal grievance, and these forms are available in the prison control rooms or from a counselor or officer on duty for those inmates in the Special Management Unit. If dissatisfied with the Warden's response to the informal grievance, an inmate can file a formal grievance. If the inmate is still dissatisfied with the response, he can file an appeal with the Central Office.

Plaintiff generally contends that he did exhaust his remedies by filing grievances. Plaintiff filed an informal grievance on February 9, 2005 concerning

his claim that certain telephone and visitation privileges were restricted in retaliation for his having filed a civil action against officials in the past. (Doc. No. 19, Ex. 1). He filed a formal grievance on February 22, 2005. Plaintiff appealed the Warden's response on April 7, 2005 and received a response to his appeal from the Central Office on April 19, 2005. However, Plaintiff filed his Complaint in this case on March 21, 2005, before receiving a final response from the Central Office regarding his appeal. Thus, Plaintiff failed to exhaust his available administrative remedies regarding his retaliation claim prior to filing this suit and the retaliation claim should be dismissed without prejudice as a result.

III. Qualified Immunity

Defendants contend that Plaintiff cannot show that they had "fair warning" that the specific actions alleged by Plaintiff were unconstitutional. Defendants assert that, as a result, they are entitled to the defense of qualified immunity.

The law governing whether a government official is entitled to qualified immunity is well-established in the Eleventh Circuit. Qualified immunity protects governmental officials performing discretionary functions from suit in their individual capacities, so long as their conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Gonzalez v. Reno*, 325 F.3d 1228, 1232 (11th Cir. 2003) (quoting *Hope v.*

Pelzer, 536 U.S. 730, 739, 122 S. Ct. 2508, 2515, 153 L. Ed. 2d 666 (2002)). A government official must first prove that he was acting within his discretionary authority. *Id.* at 1233; *Ray v. Foltz*, 370 F.3d 1079, 1081-82 (11th Cir. 2004). "A government official acts within his or her discretionary authority if objective circumstances compel the conclusion that challenged actions occurred in the performance of the official's duties and within the scope of this authority." *Hill v. DeKalb Reg'l Youth Detention Ctr.*, 40 F.3d 1176, 1184 n. 17 (11th Cir. 1994). Once the government official has shown he was acting within his discretionary authority, the burden shifts to the Plaintiff to show that the Defendant is not entitled to qualified immunity. The Supreme Court has established a two-part test to determine the applicability of qualified immunity. First, the court must determine whether plaintiff's allegations, taken as true, establish a constitutional violation. *Hope*, 536 U.S. at 736, 122 S. Ct. At 2513. If, under the plaintiff's allegations, the defendants would have violated a constitutional right, the next step is to ask whether the right was one that was clearly established under the law. *Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 2156, 150 L. Ed. 2d 272 (2001); *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1264 (11th Cir. 2004).

At the time of the events in question, it was clearly established law that prisoners retain First Amendment rights. *Thomburgh v. Abbott*, 490 U.S. 401, 407, 109 S. Ct. 1874, 1878, 104 L. Ed. 2d 459

(1989) (quoting *Turner v. Safley*, 482 U.S. 78, 84, 109 S. Ct. 2254, 2259, 96 L. Ed. 2d 64 (1987)) "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution"). It was clearly established law that prison officials could not open correspondence addressed to an inmate which was legal in nature as determined from the envelope. *Lemon v. Dugger*, 931 F.2d 1465, 1467-68 (11th Cir. 1991). It was also clearly established law that legal correspondence must have been opened in the presence of the inmate. *Wolff v. McDonnell*, 418 U.S. 539, 576-77, 94 S. Ct. 2963, 2984-2985, 41 L. Ed. 2d 935 (1974)). Therefore, Defendants are not entitled to summary judgment based on qualified immunity.

IV. Physical Injury Requirement

Defendants assert that Plaintiff should not be able to recover punitive damages for his First Amendment claims because he did not suffer a physical injury. The Prison Litigation Reform Act provides in part that

> No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury.

42 U.S.C. § 1997e(e). The purpose of this statute is "to reduce the number of frivolous cases filed by imprisoned plaintiffs, who have little to lose and excessive amounts of free time with which to pursue their

complaints." *Napier v. Preslicka*, 314 F.3d 528, 531 (11th Cir. 2002) (citing *Harris v. Garner*, 216 F.3d 970, 976-79 (11th Cir. 2000)). "Tracking the language of [this] statute, § 1997e(e) applies only to lawsuits involving (1) Federal civil actions (2) brought by a prisoner (3) for mental or emotional injury (4) suffered while in custody." *Id.* at 532. A cause of action barred by this statute "is barred only during the imprisonment of the plaintiff; therefore, such action should be dismissed without prejudice[.]" *Id.* in order to satisfy Section 1997e(e), a prisoner must allege more than a de minimis physical injury. *Harris v. Garner*, 190 F.3d 1279, 1286-87 (11th Cir. 1999).

The Eleventh Circuit has yet to decide whether Section 1997e(e) precludes claims for nominal and punitive damages along with compensatory damages. *Boxer X v. Donald*, 169 Fed. Appx. 555, 558-59, 558 n.1 (11th Cir. 2006). Nominal damages are appropriate in a Section 1983 case if the plaintiff establishes a violation of a fundamental constitutional right, even if he cannot prove actual injury sufficient to entitle him to compensatory damages. *Carey v. Piphus*, 435 U.S. 247, 255, 98 S. Ct. 1042, 55 L. Ed. 2d 252 (1978). Punitive damages may be imposed under Section 1983 with the specific purpose of deterring or punishing violations of constitutional rights. *Id.* at 257 n.11. Although the Eleventh Circuit has yet to decide whether Section 1997e(e) precludes a prisoner from seeking nominal or punitive damages, the Court of Appeals has noted that the Second, Third Seventh, Ninth and Tenth Circuits have

concluded that Section 1997e(e) does not preclude a prisoner from seeking nominal damages, *Boxer X v. Donald*, 169 Fed. Appx. at 558-59, and that circuits elsewhere are split on the issue of punitive damages under Section 1997e(e). *Id.* at 558 n.1.

Defendants assert that Plaintiff has suffered no physical injury and thus his claims for punitive damages are barred. However, the absence of a physical injury means only that Plaintiff cannot recover compensatory damages for any mental or emotional injury; it merely limits the nature of Plaintiff's damages. *Id.* at 558. Plaintiff is not precluded from bringing claims for other types of monetary relief without a showing of physical injury. *Id.* Accordingly, Defendants are not entitled to summary judgment on this point.

CONCLUSION

Based on the foregoing, Plaintiff's Motion for Summary Judgment (Doc. No. 24) is **DENIED**. Defendant's Motion for Summary Judgment (Doc. No. 17) is **GRANTED** in part. Plaintiff's retaliation claim is dismissed without prejudice. Defendant's Motion for Summary Judgment is **DENIED** in part. Plaintiff's legal mail claim remains pending at this time.

SO ORDERED this 23rd day of August, 2006.

/s/ James E. Graham
JAMES E. GRAHAM
UNITED STATES
MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA STATESBORO DIVISION

JAMIL AL-AMIN,	:	
Plaintiff,	:	
vs.	:	CIVIL ACTION NO.:
HUGH SMITH, Warden, and SANCHE MARTIN-JACKSON, individually,	:	CV605-025
Defendants.	:	

ORDER

(Filed Sep. 19, 2006)

Defendants have filed a Motion for Reconsideration (Doc. No. 28) of the Courts Order dated August 23, 2006 (Doc. No. 27). In that Order, the Court granted Defendants' Motion for Summary Judgment with respect to Plaintiff's retaliation claims, but denied Defendants' Motion for Summary Judgment with respect to Plaintiff's legal mail claims. Defendants request that the Court reconsider its denial of summary judgment on Plaintiff's claim that prison officials interfered with his privileged legal mail.

In their Motion for Reconsideration, Defendants contend that there is no genuine issue of material fact as to whether an actual injury exists to support Plaintiff's legal mail claim. Defendants assert that Plaintiff has failed to provide adequate evidence of actual harm sufficient to afford relief on an access to

courts claim. Defendants cite Plaintiff's deposition, and contend that "Plaintiff failed on a number of occasions to articulate any actual harm." (Doc. No. 28, p. 2-3). Defendants further contend that the affidavit submitted by Plaintiff's wife and lawyer, Karima Al-Amin, does not allege actual injury and that, regardless, her affidavit should be considered suspect in light of Plaintiff's conflicting testimony. (Doc. No. 28, p. 5). Additionally, Defendants again allege that they are entitled to qualified immunity on Plaintiff's legal mail claim.

The exact sources of the rights at issue in a legal mail claim are somewhat vague. In the Eleventh Circuit's seminal case on the issue, however, the Court explained that the opening of a prisoner's privileged legal mail is "a violation of an inmate's constitutional rights." The court elaborated:

> The basic prisoner interest is an uninhibited communication with attorneys. . . . [P]risoners have a vital need to communicate effectively with [their attorneys]. This is to insure ultimately that the judicial proceedings brought against or initiated by prisoners are conducted fairly. Since the prisoner's means of communicating with these parties are restricted sharply by the fact of incarceration, the essential role of postal communication cannot be ignored.

Lemon v. Dugger, 931 F.2d 1465, 1467 (11th Cir. 1991) (quoting *Taylor v. Sterrett,* 532 F.2d 462, 475 (5th 1976)).

Construing the Complaint liberally, Plaintiff has stated a claim that the alleged interference with his legal mail violated both his right of access to the courts and his First Amendment right of free speech. Though these are two distinct claims, the jurisprudence on these issues has become "inextricably intertwined," so that a discussion must involve cases that address both. *See Brewer v. Wilkinson,* 3 F.3d 816, 821 (5th Cir. 1993).

I. Access to Courts

It is clear that prisoners have a constitutionally protected right of access to the courts. *Bounds v. Smith,* 430 U.S. 817, 821, 97 S. Ct. 1491, 1494, 52 L. Ed. 2d 72 (1997). Most often this right has been asserted to require that prisons undertake affirmative obligations to assure that inmates have meaningful access to the courts.[1] Some courts have read the right of an inmate not to have privileged legal mail read outside his presence as emanating from this right of access to courts. *See, e.g., Boswell v. Mayer,* 169 F.3d 384, 387 (6th Cir. 1999); *Cody v. Weber,* 256 F.3d 764, 767 (8th Cir. 2001). It is clear that under an access to courts claim, a plaintiff must satisfy the

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[1] *See, e.g., Bass v. Singletary*, 143 F.3d 1442 (11th Cir. 1998); *Wilson v. Blankenship*, 163 F.3d 1284 (11th Cir. 1998). Indeed, it is these cases, as opposed to any case with facts involving a legal mail claim, that Defendants cite and read as requiring certain very particular showings to constitute "actual injury."

requirement that there be an "actual injury" resulting from the actions of prisons officials violating the right of access to the courts. *Lewis v. Casey,* 518 U.S. 343, 349, 116 S. Ct. 2174, 2179, 135 L. Ed. 2d 606 (1996); *Wilson v. Blankenship,* 163 F.3d 1284, 1290-1291 (11th Cir. 1998).

Accordingly, as far as Plaintiff's legal mail contentions state an access to courts claim, he must demonstrate some impediment to his efforts to pursue a nonfrivolous legal claim that is either an appeal from a conviction, a habeas petition, or a civil rights action. *Lewis,* 518 U.S. at 352-54, 116 S. Ct. at 2181-2182. The Eleventh Circuit has required in certain access to courts claims involving law libraries or other means of legal assistance that the plaintiff provide evidence of a missed deadline or a prevention from raising a claim. *See, e.g., Wilson,* 163 F.3d at 1290, n. 10 (citing *Lewis,* 518 U.S. at 348, 116 S. Ct. at 2178). Defendants point out that Plaintiff has not alleged any specific deadline that has been missed as a result of the alleged interference with his legal mail.

However, Plaintiff does allege that his claims, including a civil rights action and a habeas petition, were compromised by the alleged opening of his mail. He states that he "wouldn't know as to how many other people were privy to the strategies and the law that we were using at that particular time, if my mail was being opened outside of my presence" and that interference with his privileged mail "compromises my case, which compromises my ability to obtain

justice in any court." (Pl.'s Dep., p. 29-30). First, this Court will not overlook the fact that a prison's practice of opening legal has a chilling effect on a prisoner's ability to correspond confidentially with his attorney. As other courts have noted, "a prisoner who suspects that a grievance may not remain confidential may fear retaliation by a corrections officer." *Muhammad v. Pitcher,* 35 F.3d 1081, 1083 (6th Cir. 1994). Plaintiff asserts that he had claims pending against prison officials at the time his legal mail was being opened outside of his presence. Accordingly, Plaintiff's "actual injury" may very well be that Defendants have potentially obtained an unfair advantage in defending themselves against his claims of separate constitutional violations by reading his legal mail. *See Cody v. Weber,* 256 F.3d 764, 767 (8th Cir. 2001). In light of this allegation, the Court finds that Plaintiff has indeed created a genuine issue of material fact as to whether any actual injury exists. As previously stated by this Court, there exists a factual dispute sufficient to defeat Plaintiff's Motion for Summary Judgment on Plaintiff's access to courts/legal mail claim.

II. First Amendment Freedom of Speech

Separate from his access to courts claim, Plaintiff asserts a First Amendment freedom of speech claim. There is a distinction between the standing that is required to assert direct constitutional rights, such as the right to free speech, and the standing that is required to assert claims that are derivative of those rights. Law libraries and legal assistance programs

do not represent constitutional rights in and of themselves; they are merely means for ensuring 'a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts.'" *Benjamin v. Fraser,* 264 F.3d 175, 185 (2nd Cir. 2001) (quoting *Lewis,* 518 U.S. at 351, 116 S. Ct at 2174); *Jones v., Brown,* 2006 WL 2441412, *4 (3rd Cir. 2006) (quoting *Lewis,* 518 U.S. at 351, 116 S. Ct at 2174). in these "derivative rights" cases, *Lewis* requires that an "actual injury" be shown to establish standing. *Benjamin,* 264 F.3d at 185. Conversely, where the right invoked is provided for directly by the Constitution, a prisoner has standing simply by showing a violation of that right. *Id.*

The right of access and the right of free speech are of course related, since the exercise of free speech can be a means of accessing the courts. However, the two rights are not the same, and they are not mutually exclusive. *Id.* Nothing in the reasoning of *Lewis* suggests that a prisoner alleging a legal mail claim in violation of his right to free speech need allege any consequential injury beyond the violation itself. *Jones v. Brown,* 2006 WL 2441412, *4 (3rd Cir. 2006). A prison's practice of interfering with privileged communications strips such communications of their confidentiality and impinges on the First Amendment's guarantee of freedom of speech. *Id.*

Accordingly, Plaintiff asserts two distinct claims: that interference with his legal mail violated his right of access to courts, and that interference with his legal mail violated his right to free speech. Regarding the former, Plaintiff has created a genuine issue of

material fact as to whether actual injury exists. As to the latter, Plaintiff has created a genuine issue of material fact as to whether his legal mail was interfered with in violation of his right to free speech. Consequently, Defendants are entitled to summary judgment on neither issue.

III. Qualified Immunity

Furthermore, Defendants are not entitled to summary judgment based upon qualified immunity. At the time of this incident, it was clearly established that prison officials were not to open privileged legal mail as determined from the envelope outside of the presence of the inmate. *Wolff v. McDonnell,* 418 U.S. 539, 576-77, 94, S. Ct. 2963, 2984-2985, 41 L. Ed. 2d (1974); *Lemon v. Dugger,* 931 F.2d 1465, 1467-68 (11th Cir. 1991). Whether Defendants did in fact open mail that was privileged in violation of Plaintiff's constitutional rights is an issue that should be determined by the trier of fact.

For the foregoing reasons, Defendants' Motion for Reconsideration is **DENIED**.

SO ORDERED this 19th day of September, 2006.

/s/ James E. Graham
JAMES E. GRAHAM
UNITED STATES
MAGISTRATE JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 06-15248-BB

JAMIL AL-AMIN,

Plaintiff-Appellee,

versus

WARDEN HUGH SMITH,
ADMIN. ASST. SANCHE M. MARTIN,

Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of Georgia

(Filed Feb. 27, 2008)

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Before: TJOFLAT, HULL and WILSON, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en

banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Frank M Hull
UNITED STATES CIRCUIT JUDGE

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(4)

No. 07-1485

FILED
JUL 30 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

WARDEN HUGH SMITH and SANCHE MARTIN,

Petitioners,

v.

JAMIL AL-AMIN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether allegations that prison officials repeatedly opened incoming mail from an inmate's attorney outside of his presence, in violation of the prison's own regulations and without a legitimate penological purpose, state a claim for violation of the inmate's free speech rights.

2. Whether, for purposes of qualified immunity, Eleventh Circuit law clearly established that an inmate has a right not to have attorney mail opened outside his presence without a legitimate penological purpose.

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INTRODUCTION

Petitioners seek review of an interlocutory decision refusing to extend qualified immunity to prison officials' opening of legal mail outside of an inmate's presence. This issue will not resolve this case, because Mr. Al-Amin also alleges that Petitioners "read" his legal mail. Because the district court ruled in Mr. Al-Amin's favor on the mail "opening" issue, it did not reach the "reading" claim. In these circumstances, where further proceedings involving the same facts and the same defendants will be necessary in any event, review of this case in the present interlocutory posture would be especially unwarranted.

Petitioners and state amici assert that various penological interests might justify opening legal mail outside an inmate's presence. This claim was not raised below, and no evidence has been presented to establish any legitimate penological interests. To the contrary, Petitioners' conduct directly violated Georgia prison regulations mandating that legal mail be opened only in the inmate's presence. Thus, this case is a particularly poor vehicle for the Court to address the First Amendment question presented.

Where the prison has not claimed or established legitimate penological interests supporting the opening of legal mail outside an inmate's presence, the courts of appeals uniformly have allowed the constitutional claim. The one published decision cited by Petitioners as being to the contrary involved *pro se* inmate litigants who conceded the prison had a legitimate penological interest in opening legal mail outside of their presence. Accordingly, there is not, as Petitioners assert, a conflict in the circuits on this issue.

Petitioners identify no circuit conflict on the second question presented. Both the district court and the court of appeals found that Petitioners had explicit notice that the precise factual conduct at issue was prohibited.

Accordingly, the petition for writ of certiorari should be denied.

STATEMENT OF THE CASE

Throughout his incarceration, Respondent Jamil Al-Amin has received legal mail from Karima Al-Amin, Esq., his lawyer and wife. In accordance with the procedures governing legal mail at the Georgia State Prison in Reidsville, Georgia (where Mr. Al-Amin was housed at the time of the events giving rise to this dispute), Ms. Al-Amin labeled her mail "Legal Mail" and identified herself as an "Attorney at Law." Pet. App. 2-3.

Under the prison's regulations, legal mail may be externally inspected for contraband, may not be read, and may be opened only in the presence of the inmate. *Id.* at 6. After numerous letters from Ms. Al-Amin were opened outside his presence in 2002 and 2003, Mr. Al-Amin filed an administrative grievance. *Id.* at 4. During the investigation of that grievance, one of the Petitioners acknowledged that she had read Ms. Al-Amin's mail, describing it as being "of a personal nature." *Id.*

Ultimately, Mr. Al-Amin's grievance was upheld, and Petitioners were directed to cease opening legal mail from Ms. Al-Amin outside of his presence. *Id.* at 6.

Petitioners, however, continued to open properly marked legal mail from Ms. Al-Amin outside Mr. Al-Amin's presence, resulting in a second grievance and a second recognition by the prison grievance appeal officer that the prison regulations precluded such opening. *Id.* at 7-8 n.9.

After the initial grievance ruling in Mr. Al-Amin's favor on November 25, 2003, at least thirteen additional legal mail letters from Ms. Al-Amin were opened outside of Mr. Al-Amin's presence. *Id.* at 7. Mr. Al-Amin then filed this suit *pro se* under 42 U.S.C. § 1983, alleging that Petitioners continued "to open and read all of Al-Amin's privileged mail" outside of his presence, in violation of the prison regulations and his "constitutional rights." *Id.* at 9. Mr. Al-Amin sought, *inter alia*, a permanent injunction against Petitioners' continuing violations. *Id.* at 9-10.

Petitioners moved for summary judgment on multiple grounds, including qualified immunity. *Id.* at 10-11. The district court denied the motion, rejecting Petitioners' factual challenge to Ms. Al-Amin's status as one of Mr. Al-Amin's lawyers and further finding that Mr. Al-Amin had created a genuine issue of fact as to whether he suffered actual injury as a result of Petitioners' conduct. *Id.* at 45-48. With respect to qualified immunity, the district court found that an inmate's right to have legal mail opened only in his or her presence was clearly established. *Id.* at 52 (citing *Wolff v. McDonnell*, 418 U.S. 539, 576-77 (1974), and *Lemon v. Dugger*, 931 F.2d 1465, 1467-68 (11th Cir. 1991)).

Petitioners moved for reconsideration, challenging the court's finding that Mr. Al-Amin had presented sufficient evidence of "actual injury" to withstand summary judgment. Pet. App. 56-57. In denying that motion, the court discussed two separate bases for an inmate's right to receive unopened and unread legal mail: (1) the right of meaningful access to the courts, and (2) the First Amendment right to freedom of speech. *Id.* at 58. First addressing the right of access to courts, the court agreed with Petitioners that "actual injury" was required under *Lewis v. Casey*, 518 U.S. 343, 349 (1996). The court noted that Mr. Al-Amin had identified two distinct actual injuries: a "chilling effect" on his ability to correspond with and be advised by his lawyer, and the "unfair advantage" resulting from prison officials' access to Mr. Al-Amin's attorneys' communications and work product in connection with a separate § 1983 action. *Id.*

The court also found that Petitioners' conduct violated Mr. Al-Amin's right of free speech, a right "provided for directly by the Constitution" and therefore actionable without the need for showing "any consequential injury beyond the violation itself." *Id.* at 61 (citing *Jones v. Brown*, 461 F.3d 353, 359-60 (3d Cir. 2006), *cert. denied*, 127 S. Ct. 1822 (2007)). Petitioners' practice of "interfering with privileged communications strips such communications of their confidentiality and impinges on the First Amendment's guarantee of freedom of speech." *Id.*

The court further found that Petitioners were not entitled to qualified immunity: "At the time of this incident, it was clearly established that prison officials

were not to open privileged legal mail as determined from the envelope outside of the presence of the inmate." *Id.* at 62.

Petitioners immediately appealed the interlocutory denial of qualified immunity to the Eleventh Circuit, which appointed counsel for Mr. Al-Amin. Pet. 5. The court of appeals affirmed in part (on the free speech claim) and reversed in part (on the court access claim). Pet. App. 1-41. In its decision, the court of appeals emphasized that Mr. Al-Amin was not challenging the prison's regulations governing legal mail. *Id.* 12. Rather, Mr. Al-Amin's claim was that Petitioners, "in repeatedly opening his attorney mail outside his presence, violated not only that prison policy but also his constitutional rights to access to the courts and free speech." *Id.*

Turning to Petitioners' legal contentions, the court of appeals addressed the claim that the binding decisions in *Taylor v. Sterrett*, 532 F.2d 462 (5th Cir. 1976), and *Guajardo v. Estelle*, 580 F.2d 748 (5th Cir. 1978) – which prohibited prison officials from opening marked legal mail outside of an inmate's presence – were "no longer good law" due to this Court's ruling in *Turner v. Safley*, 482 U.S. 78 (1987).

Addressing the single appellate decision finding such a change in the law, *Brewer v. Wilkinson*, 3 F.3d 816 (5th Cir. 1993), the court of appeals emphasized several key concessions by the *pro se* inmates in that case, most notably that the prison had a "legitimate penological objective" in opening their mail. *Id.* at 23. The court also noted that post-*Turner* decisions from the Second, Third, Sixth, Seventh, and Eighth Circuits "have

concluded that opening properly marked legal attorney mail outside a prisoner's presence infringes the constitutional right of access to the courts." *Id.* at 23-27 & nn.25-30.

The Eleventh Circuit then analyzed the *Turner* factors and agreed that inmates retained the right not to have properly marked legal mail opened outside of their presence. Pet. App. 27-28. As for the "valid, rational connection" between the prison practice (here, a practice that violated the prison's own regulations), and a "legitimate governmental interest," the court observed that Petitioners had not attempted to articulate "a legitimate security interest in opening properly marked legal mail outside Al-Amin's presence." *Id.* at 28.

The second *Turner* factor – the availability of other means to protect Mr. Al-Amin's constitutional right – likewise favored Mr. Al-Amin, because opening attorney mail in the inmate's presence "ensures that the inmate's correspondence with his attorney is not inhibited or chilled by his fear that this correspondence may be read by prison officials." *Id.*

The court noted that Petitioners offered no evidence relative to the third *Turner* factor, *i.e.*, that opening mail in the inmate's presence unduly burdens prison resources. *Id.* at 29. To the contrary, Georgia's own prison policy "already requires opening attorney mail in an inmate's presence." *Id.* Finally, the Eleventh Circuit held that opening legal mail in the inmate's presence balances the inmate's rights and the prison's interests and "fully accommodates the prisoner's rights

as *de minimis* cost to valid penological interests." *Id.* (citing *Turner*, 482 U.S. at 91). Thus, the court concluded that all four *Turner* factors weighed in Mr. Al-Amin's favor.[1]

Nevertheless, the Eleventh Circuit rejected Mr. Al-Amin's court access claim, on the ground that he had not established the "actual injury" required to pursue a claim for interference with his right of access to the courts. *Id.* at 31-33. The court of appeals disagreed with the district court's finding that Mr. Al-Amin had presented sufficient evidence of "actual injury" to his other pending cases as a result of Petitioners' violations. *See* Pet. App. 47-48, 59-60.

The court of appeals unanimously agreed, however, with the district court's ruling that Petitioners' conduct constituted a violation of Mr. Al-Amin's free speech rights, *id.* at 36, and that Mr. Al-Amin need not show further consequential injury to proceed on this claim. *Id.* at 38. The court followed the Third Circuit's reasoning in *Jones v. Brown*, 461 F.3d 353, 359-60 (3d Cir. 2006), *cert. denied*, 127 S. Ct. 1822 (2007), which held that "the practice of opening attorney mail outside of the inmate's presence 'deprives the expression of confidentiality and chills the inmate's protected expression, regardless of the state's good-faith protestations that it does not, and will not, read the

1. The court of appeals buttressed its conclusion by citing *Lemon v. Dugger*, 931 F.2d 1465 (11th Cir. 1991), a post-*Turner* decision which noted that opening mail in an inmate's presence "'insures that prison officials *will not read the mail*' and thus does not chill attorney-inmate communications." Pet. App. 30 (quoting 931 F.2d at 1367 (quoting *Wolff*, 418 U.S. at 577)).

content of the communications.'" *Id.* at 35-36. This is so because "'the only way to ensure that mail is not read when opened . . . is to require that it be done in the presence of the inmate to whom it is addressed.'" *Id.* at 36 (quoting *Jones*, 461 F.3d at 359). Thus, Mr. Al-Amin could pursue a claim for violation of the "fundamental constitutional right" of free speech without establishing further consequential injury, because "'protection of an inmate's freedom to engage in protected communication is a constitutional end in itself.'" *Id.* at 37 (quoting *Jones*, 461 F.3d at 359-60).

The court of appeals rejected Petitioners' argument that the prohibition on their conduct was not "clearly established." Pet. App. 38-40. The court found the proper inquiry to be whether the conduct at issue shares a "high degree of factual similarity with conduct previously held unlawful and unconstitutional." *Id.* As "exact factual identity exists between prior case law and defendants' factual conduct," Petitioners had "fair and clear notice that opening Al-Amin's attorney mail outside his presence was unlawful and violated the Constitution." *Id.* at 40. Accordingly, the court remanded for further proceedings on the free speech claim.

REASONS FOR DENYING THE PETITION

I. THIS CASE PRESENTS A POOR VEHICLE FOR CONSIDERING THE QUESTIONS PRESENTED.

A. An inmate's right not to have legal mail opened and read outside his presence has long been clearly established. *See Sallier v. Brooks*, 343 F.3d 868, 873-74, 877, 879 (6th Cir. 2003) (citing *Muhammad v. Pitcher*, 35 F.3d 1081 (6th Cir. 1994)); *Lemon v. Dugger*, 931 F.2d 1465, 1467 (11th Cir. 1991). Petitioners "do not contend that they are entitled to read Al-Amin's attorney mail. Nor do [they] deny that the law is well established that Al-Amin has a constitutional right that precludes them from reading Al-Amin's attorney mail." Pet. App. 10 n.13.

Petitioners' assertion that this case involves "opening, but not reading, of legal mail outside the presence of an inmate" (Pet. 2) is not an accurate description of the record and proceedings below. Mr. Al-Amin's Complaint alleges repeatedly that his attorney mail was opened and read outside his presence.[2] In rejecting Petitioners' summary judgment motion, the

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2. *See* Compl. (R1-1) ¶¶ 4, 5, 9, 10, 14, 15, 16, 17, 19, 21, 22; Pet. App. 10 n.13. Mr. Al-Amin's deposition testimony likewise described the factual bases for his claim that prison officials were "opening and reading" his legal mail, which he asserted was retaliatory. *See, e.g.*, R2-19-Ex. F, at 15. In denying Petitioner's motion for reconsideration, the district court referred to Petitioners as having "potentially obtained an unfair advantage in defending themselves against his claims of separate constitutional violations by reading his legal mail." Pet. App. 60.

district court found the "opening" of the legal mail outside Mr. Al-Amin's presence sufficient to establish a constitutional violation, without having to determine whether Petitioners read the mail. Pet. App. 46-48, 52, 60-62.

Having prevailed before the district court, Mr. Al-Amin had no basis to appeal the trial court's failure to reach the reading issue. Thus, there is no basis for Petitioners' assertion that Mr. Al-Amin's reading claim was "abandoned on appeal." Pet. 4 n.2.[3]

Before the court of appeals, Petitioners challenged only the "opening" ruling and the denial of qualified immunity for that claim. *Id.* The Eleventh Circuit and the parties addressed the purely legal issue raised by the qualified immunity challenge and focused their arguments and decision on (a) the constitutional grounds for the right of an inmate to receive unopened legal mail and (b) whether this right was so clearly established the petitioners could not avoid liability under a qualified immunity defense.

No matter the answers to those questions, resolution of the "opening and reading" claim will require district court litigation over the same facts and against the same defendants involved in the interlocutory ruling at issue here. *See generally* Eugene

3. There likewise is no basis for Petitioners' assertion that "the parties agreed that the sole issue for appeal was the opening of Al-Amin's legal mail." *Id.* at 5. No such "agreement" was proposed by Petitioners or entered by the parties at any time during the proceedings below, nor was such an agreement acknowledged or relied upon by the court of appeals.

Gressman, et al., *Supreme Court Practice* § 4.18 (9th ed. 2007) (noting that, ordinarily, certiorari should not be granted to review decisions on appeal from an interlocutory order). In these circumstances – where the action will proceed without regard to any ruling by this Court concerning the more limited "opening mail" claim – this consideration has special force, because it serves little purpose to determine either the merits or the qualified immunity issue with respect to only one aspect of the claims at issue when the remainder will be subject to further proceedings in any event. *Cf. Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (qualified immunity is "an entitlement not to stand trial or face the other burdens of litigation").

B. The Petition briefly notes, and the amicus brief asserts in detail, security risks allegedly presented by requiring legal mail to be opened in the presence of an inmate. Pet. 14-16; Amici Br. 1-3, 4-9, 16-18. In this case, however, there is no evidence of such security concerns or other governmental interests. In fact, it is undisputed that Petitioners' actions violated the applicable prison regulations, which mandate that properly marked legal mail be opened only in the presence of the inmate. *See* Ga. Dep't of Corrections, SOP IIB04-0001 (quoted in Pet. App. 3-4).[4] Given that Georgia's own regulations accept that legal mail must be opened in the inmate's

4. The Federal Bureau of Prisons has a similar regulation. *See* 28 C.F.R. § 540.18(a); U.S. Bureau of Prisons, Mail Management Manual §§ 305-06 (Program Statement 5800.10) (1998), *available at* www.bop.gov/DataSource/execute/dsPolicyLoc ("Staff shall open inmate special mail [including legal mail] in the inmate's presence."); States' Amicus Br. 14 ("Such policies, like Georgia's in this case, are now widespread.").

presence, and given that the state amici rest their arguments on security interests not advanced by Georgia, this case is a poor vehicle for weighing prison security interests against an inmate's free speech rights.

Moreover, Georgia's regulations accord with binding precedent disapproving the conduct at issue here. *See Guajardo*, 580 F.2d 748; *Taylor*, 532 F.2d 462. The Petition identifies no security breach resulting from these precedents during the many years in which they have governed the behavior of prison officials in the Eleventh Circuit. Likewise, post-*Turner* appellate decisions in other circuits over the past 15 years state the same holding as the decision below, *see infra* at 13-14, and Petitioners offer no evidence to suggest that these decisions have led to any interference with the operation of prisons in those jurisdictions.

The States' amicus brief (at 4-8) argues that there may be legitimate reasons to open mail, including legal mail, outside the presence of the inmate. The decision below does not preclude prison systems from promulgating regulations attempting to authorize such conduct in the context of a specific "penological interest." No such regulations, however, are at issue here. Likewise, the States' concern (Amici Br. 8) about what types of mail, other than attorney-client mail, must be opened in the inmate's presence is not presented here.

Indeed, the States' amicus brief indicates that Pennsylvania has enacted a more restrictive legal mail regulation, with district courts reaching different decisions as to its constitutionality. Amici Br. 6-7 & n.3.

These decisions currently are on appeal to the Third Circuit. *See id.* In such a case, the evidence supporting the government's security assertions would have been subject to lower court factual review before they came to this Court. In this case, in contrast, there is no evidentiary record whatsoever on which the Court could determine whether penological interests ever justify opening legal mail outside the inmate's presence. Thus, in the event the Court wishes to review the First Amendment question raised here, the Third Circuit's forthcoming decision would provide a far superior vehicle than the present case.

II. THE FIRST QUESTION PRESENTED BY THE PETITION DOES NOT WARRANT CERTIORARI REVIEW.

A. The Petition acknowledges that the Eleventh Circuit joined the Second, Third, and Sixth Circuits in holding that inmates have a First Amendment free speech right to communicate with their attorneys by mail and that opening attorney mail outside the inmates' presence infringes that right. *See Jones v. Brown*, 461 F.3d 353, 359 (3d Cir. 2006), *cert. denied*, 127 S. Ct. 1822 (2007); *Davis v. Goord*, 320 F.3d 346, 351 (2d Cir. 2003); *Muhammad v. Pitcher*, 35 F.3d 1081 (6th Cir. 1994). As noted by the court of appeals, the Eighth Circuit also recognizes a constitutional claim based on the opening of inmate legal mail outside of his presence. Pet. App. 24 (citing *Powells v. Minnehaha County Sheriff Dept.*, 198 F.3d 711, 712 (8th Cir. 1999)).

As further noted by the court below, the Seventh Circuit agrees with these circuits. Pet. App. 23-24 (citing

Kaufman v. McCaughtry, 419 F.3d 678, 686 (7th Cir. 2005) ("Inmates have a First Amendment right both to send and receive mail," and "when a prison receives a letter for an inmate that is marked with an attorney's name and a warning that the letter is legal mail, officials potentially violate the inmate's rights if they open the letter outside of the inmate's presence.")); *see also Antonelli v. Sheahan*, 81 F.3d 1422, 1432 (7th Cir. 1995) (allegations that legal mail was opened, that mail was delayed, and that mail was stolen stated First Amendment claim); *Castillo v. Cook County Mail Room Dep't*, 990 F.2d 304, 305-06 (7th Cir. 1993); *cf. Rowe v. Shake*, 196 F.3d 778, 782 (7th Cir. 1999) (distinguishing case involving opening of non-legal mail from *Antonelli* and *Castillo*, which "held that prisoners had stated a cause of action under the First Amendment").

Arguing that Seventh Circuit law does not recognize a First Amendment claim, Petitioners cite *Lewis v. Cook County Board of Commissioners*, 6 Fed. Appx. 428 (7th Cir. 2001). That unpublished decision relied on *Rowe*, which addressed non-legal mail, to hold that the plaintiff's allegation that his legal mail was opened outside his presence was insufficient, without more, to state a First Amendment claim. Unlike *Kaufman v. McCaughtry*, *Antonelli*, and *Castillo*, the unpublished decision in *Lewis v. Cook County* has no precedential value in the Seventh Circuit. *See* 7th Cir. R. 32.1.[5]

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5. The States' amicus brief cites an additional unpublished opinion, *Kaufman v. Karlen*, No. 07-2712, 2008 WL 744140 (7th Cir. Mar. 20, 2008). There, in a one-paragraph discussion, the court affirmed summary judgment against a *pro se* inmate,

(Cont'd)

Petitioners principally rely on *Brewer v. Wilkinson*, 3 F.3d 816 (5th Cir. 1993), where the Fifth Circuit held that opening incoming legal mail outside the presence of inmates did not violate their First Amendment rights. There, however, the two *pro se* inmate plaintiffs "concede[d] that such mail was opened and inspected for [a] 'legitimate penological objective.'" *Id.* at 825. The significance of this concession is shown by the court's holding with regard to inmate Brewer's *outgoing* mail claim. Finding that Brewer had asserted a clearly established constitutional violation based on the handling of his outgoing mail, the Fifth Circuit stated: "Appellant Brewer has not conceded that some legitimate penological interest justified the alleged removal of legal material." *Id.* at 826 (internal punctuation omitted).

The Fifth Circuit has not considered an incoming legal mail claim in a case in which the plaintiffs did not concede mail was opened to further a legitimate penological interest. Here, Mr. Al-Amin expressly disputes that Petitioners acted in furtherance of a legitimate penological interest when opening his attorney mail outside his presence and in violation of the applicable prison regulations. The decision below expressly held that "all four *Turner* factors weigh in [his] favor" on this point. Pet. App. 29.

(Cont'd)

where the inmate offered no evidence that his legal mail had been opened intentionally and no argument that opening his legal mail had interfered with his right to counsel or access to courts. *Id.* at *4. As the States acknowledge (at 12), the opinion "did not explicitly consider whether opening the inmate's incoming legal mail outside his presence could amount to a separate free speech violation."

B. Petitioners briefly argue that the decision below is inconsistent with *Shaw v. Murphy*, 532 U.S. 223 (2001), and *Lewis v. Casey*, 518 U.S. 343 (1996). Petitioners are incorrect. The question in *Shaw* was whether inmates possess a special First Amendment right to provide legal assistance to fellow inmates, 532 U.S. at 227, 232, and the Court held that regulations about inmate-to-inmate communication need not take into account the content of the communication. That case did not address incoming attorney mail and is inapposite here.

In *Casey*, this Court held that an inmate asserting a § 1983 claim based on denial of the constitutional right of access-to-courts must show a consequential injury to proceed with the claim. 518 U.S. at 349. In this case, the court of appeals has applied that holding, rejecting Mr. Al-Amin's access-to-courts claim based on *Casey*. *See* Pet. App. 31, 33.

The Eleventh Circuit did not extend *Casey* to free speech claims, and no federal court of appeals appears to have done so. The Eleventh Circuit followed the Third Circuit's holding that a state prison's opening of attorney mail outside the inmate's presence "interferes with protected communications, strips those communications of their confidentiality, and accordingly impinges upon the inmate's right to freedom of speech." Pet. App. 35 (quoting *Jones v. Brown*, 461 F.3d at 359). This violation of a "fundamental constitutional right" is actionable without further consequential injury, because "'protection of an inmate's freedom to engage in protected communications is a constitutional end in itself.'" *Id.* at 37 (quoting *Jones*, 461 F.3d at 359-60); *see*

also Taylor v. Sterrett, 532 F.2d 462, 476 (5th Cir. 1976) (discussing inhibitory effect on attorney-client communications of opening legal mail outside inmate's presence). This is especially so where, as here, the inmate sought injunctive relief against further violations as well as nominal damages. Pet. App. 9-10, 37-38.

III. PETITIONERS HAVE IDENTIFIED NO CIRCUIT SPLIT OR OTHER BASIS FOR REVIEW OF THE SECOND QUESTION PRESENTED.

Petitioners identify no circuit split with regard to the second question concerning the Eleventh Circuit's qualified immunity ruling. Instead, Petitioners argue that this Court's decision in *Casey* undermines the holding that it was "clearly established" that opening legal mail outside the presence of the inmate was unconstitutional. *Casey*, however, does not question (or even address) an inmate's right to have his legal mail opened only in his presence. Rather, rejecting court-ordered changes to provide better library access and legal assistance to inmates throughout Arizona, *Casey* clarifies that in access-to-courts cases, inmate plaintiffs must show consequential injury to satisfy the constitutional prerequisite of standing. *See Casey*, 518 U.S. at 349 & n.1, 351, 353 n.4, 356, 357, 358 (discussing standing and constitutional prerequisite of actual injury). This does not mean that a court-access violation did not occur, only that a prisoner cannot challenge the violation absent a derivative injury to his ability to pursue separate legal matters. Further, *Casey* did not address a direct violation of the fundamental constitutional right of free speech, which is actionable without the need to show further consequential injury.

On the qualified immunity issue presented here, *Casey* has no bearing on Petitioners' "notice" that their specific "conduct" violated the Constitution. "[Q]ualified immunity operates 'to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful.'" *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (internal quotation marks omitted); *see also Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (qualified immunity inquiry looks to whether the law "clearly establish[ed] that the officer's conduct would violate the Constitution"). As the decision below explained, Petitioners had "fair warning" that "their precise conduct (opening an inmate's attorney mail outside his presence) is unlawful and a constitutional violation" at the time they opened Mr. Al-Amin's legal mail. Pet. App. 39, 40 (citing *Guajardo*, 580 F.2d at 748, and *Taylor*, 532 F.2d at 462). Petitioners' subjective understanding of the constitutional basis for Al-Amin's clearly established right not to have his legal mail opened outside his presence is not pertinent to the inquiry where Petitioners indisputably were "on notice their conduct [was] unlawful." *See Hope*, 536 U.S. at 747 (holding qualified immunity analysis is an "objective" test).

Petitioners cite no split among the circuits on this question. Circling back to the Fifth Circuit decision in *Brewer*, however, Petitioners contend that prison officials in the Eleventh Circuit would not have known whether opening legal mail outside the inmate's presence was a constitutional violation because the precedent established by *Taylor* and *Guajardo* (which applied in both the Fifth and Eleventh Circuits) was "repudiated" by the Fifth Circuit panel in *Brewer*. First, petitioners had no reason to rely on post-1981 Fifth

Circuit case law to determine the law of the Eleventh Circuit, because – regardless of subsequent development in Fifth Circuit law – the earlier precedents remain the law of the Eleventh Circuit unless and until the Eleventh Circuit were to overrule them. *United States v. Blanton*, 793 F.2d 1553, 1559 n.6 (11th Cir. 1986) ("The current Fifth Circuit has overruled both *Brooks* and *Nicoll* . . . . When this Circuit was created, we adopted the case law of the former Fifth Circuit as it existed on the day of the split . . . . We are not bound by the subsequent development of the law in the new Fifth Circuit. Accordingly, *Brooks* and *Nicoll* are still good law in the Eleventh Circuit.") (citation omitted).

Second, Petitioners put more weight on *Brewer* than that decision can bear. *Brewer* held that prison officials may open inmates' legal mail outside their presence when justified by a concededly "legitimate penological objective" under *Turner*'s four-part test. Thus, *Brewer* gave petitioners no reason to think that they could open Mr. Al-Amin's mail outside his presence when doing so was *not* reasonably related to a legitimate penological purpose, but instead was done, for example, to retaliate, as is alleged here. At the same time, the case law of every other circuit to address the issue gave notice that an inmate has a right to be present when his legal mail is opened. *See* cases cited *supra* at 13-14.

In any event, the narrow question whether pre-1981 case law remained good law in the Eleventh Circuit or whether that case law was undermined to any degree by a post-1981 Fifth Circuit decision case law does not warrant Supreme Court review. There is no conflict among the circuits on that question.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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In The
Supreme Court of the United States

WARDEN HUGH SMITH and
SANCHE MARTIN,

Petitioners,

v.

JAMIL AL-AMIN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Whether the First Amendment requires special handling of prisoners' legal mail is an issue that has badly divided the federal courts of appeals. This issue has percolated through the courts ever since this Court remarked in *Wolff v. McDonnell,* 418 U.S. 539 (1974), that by opening legal mail in the presence of a prisoner prison officials were doing "all, and perhaps even more than the Constitution requires," *id.* at 577; and even the court below acknowledged that those courts have reached differing results. Pet. App. 21-27. Respondent's attempts to deny or minimize this division are unconvincing.

Respondent does not dispute that the questions presented by this petition, which affect the day-to-day administration of prisons throughout the country, are important. Nor does he deny that the holding of the court below created a new, free-standing constitutional right for prisoners, separate and distinct from the Sixth Amendment right to counsel and the right to access the courts, and this free-standing right in turn allows inmates to maneuver around the actual-injury requirement established by *Lewis v. Casey,* 518 U.S. 343 (1996). For all these reasons, the time is now ripe for the Court to consider this issue, which the Court has not reviewed since it decided *Wolff* over thirty years ago.

Despite what Respondent says, the facts of this case are not an obstacle to meaningful review of the

issue presented: whether opening, but not reading, legal mail outside an inmate's presence violates the inmate's First Amendment rights. Even if unresolved issues were to remain after this Court's review, that is neither unusual, nor does it affect the import or scope of the issue presented. To the contrary, the clarity of both the relevant facts and the holding below make this an ideal case to decide the issue presented.

I. DESPITE RESPONDENT'S ATTEMPT TO DENY IT, THE SPLIT AMONG THE CIRCUITS IS REAL AND PRESSING.

Respondent says that the Fifth Circuit's decision in *Brewer v. Wilkinson*, 3 F.3d 816 (5th Cir. 1993) and the Seventh Circuit's decision in *Lewis v. Cook County*, 6 Fed. Appx. 428 (7th Cir. 2001) do not conflict with the Eleventh Circuit's decision in this case, or with those of the other circuits with which the Eleventh Circuit agreed. Respondent's argument simply cannot be squared with the plain words of the decisions themselves. In *Brewer* the Fifth Circuit could hardly have been clearer:

> [W]e thus acknowledge that what we once recognized in [*Taylor v.*] *Sterrett* [532 F.2d 462 (5th Cir. 1976)] as being "compelled" by prisoners' constitutional rights – i.e., that a prisoner's incoming legal mail be opened and inspected only in the prisoner's presence, is no longer the case. . . . The Appellants, therefore, have not stated a cognizable

> constitutional claim *either* for a denial of access to the courts *or* for a denial of their right to free speech by alleging that their incoming legal mail was opened and inspected for contraband outside their presence.

Brewer, 3 F.3d at 825 (internal citations omitted, emphases added).

For its part, the Eleventh Circuit likewise discussed this issue largely in terms of the continuing validity of *Taylor v. Sterrett*, and of the similar holding in *Guajardo v. Estelle*, 580 F.2d 748 (5th Cir. 1978), and made no attempt to conceal its fundamental disagreement with the Fifth Circuit. "Subsequent to *Turner*, the Fifth Circuit reconsidered *Taylor* and *Guajardo* and rejected their holdings. . . . [W]e conclude that our well-established law in *Taylor* and *Guajardo* . . . is not changed by *Turner* and remains valid. . . ." Pet. App. 27, 28.

Admittedly, Brewer did not dispute that prison officials had a legitimate interest in opening legal mail, but both Brewer and Al-Amin buttress their constitutional argument by showing that the opening of legal mail outside the presence of the inmate violated established prison policy. The difference in the holdings is that the Fifth Circuit did not treat this policy violation as proof of a lack of legitimate penological interest, while the court below found just that. In other words, in the Fifth Circuit there is no valid First Amendment free speech claim for opening an inmate's legal mail outside of his presence, but in the Eleventh Circuit there is. The distinction

proffered by Respondent has no bearing on the ruling of the Fifth Circuit and thus has no impact on the existence of a clear and defined split in the circuit courts.

The circuit and district courts in the Seventh Circuit also decline to afford "special" constitutional protection to legal mail. *See Lewis v. Cook County Bd. of Commissioners*, 6 Fed. Appx. 428, 430 (no basis for a free speech claim for opening of inmate legal mail); *Vasquez v. Raemisch*, 480 F.Supp.2d 1120, 1138-1141 (W.D. Wis. 2007) (same). Respondent attempts to minimize the importance of these cases by relying on *Kaufman v. McCoughtry*, 419 F.3d 678, 686 (7th Cir. 2005) and *Antonelli v. Sheahan*, 81 F.3d 1422 (7th Cir. 1995), but his reliance is misplaced First, *Kaufman* does not hold that the opening of legal mail is a *free speech* violation. Rather, *Kaufman* holds only that the opening of legal mail may state a "potential" *access to courts* claim, *if* the requisite actual injury is shown. *See Kaufman*, 419 F.3d at 685-686. That, of course, is a far cry from what the Eleventh Circuit held here. And *Antonelli v. Sheahan*, has little to do with opening legal mail. Rather, as noted by the court in *Lewis v. Cook County*, *Antonelli* holds only that a potential First Amendment claim exists where it is alleged that legal mail "was delayed for an inordinate amount of time and sometimes stolen." *Lewis v. Cook County*, 6 Fed. Appx. at 430 (internal quotes

omitted).[1] Thus, despite respondent's arguments, the disagreement among the circuits is real and the Court should resolve it.

II. THIS CASE PROVIDES AN APPROPRIATE VEHICLE TO RESOLVE THE QUESTIONS PRESENTED.

Respondent contends that this case presents a poor vehicle for review first because there is an open question whether prison officials read his mail and secondly because prison officials violated institutional policy when they opened the legal mail outside of his presence. Both arguments lack merit. Al-Amin argued below as he does now, that the opening of his legal mail chilled his speech because the only way to guarantee that the mail would not be read would be to open it in his presence. *Id.* at 33. Presumably, if Respondent's speech would be "chilled" by the opening of legal mail, it would also be chilled by the reading of legal mail. The question is, whether the "chilling" effect gives rise to a constitutional claim separate and apart from any claim under the Sixth Amendment or one for denial of access-to-courts. It is indisputable that the court below squarely decided that the opening of an inmate's legal mail constitutes a violation of the First Amendment separate and apart from an access-to-courts claim. The argument

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[1] It is important to note that *Antonelli* was published prior to this Court's decision in *Lewis v. Casey*.

that there may be issues remaining in the case after reversal has no bearing on the issue to be decided.

Next, Al-Amin contends that this case presents a poor vehicle for review because prison officials violated a valid institutional policy in opening legal mail, so only the propriety of the officials' individual actions, rather than the policy itself, is at issue. This distinction actually supports the need for certiorari in this case. The prison system's adoption of prophylactic measures to protect against intrusion on inmates' existing Sixth Amendment and access-to-court rights does not elevate those measures to constitutional stature. The failure to comply with prison policy does not amount to a constitutional violation. *Davis v. Scherer*, 468 U.S. 183 (1984). Non-compliance with stated policy cannot be dispositive under *Turner* and should not preclude the Court from granting certiorari.

Lastly, Respondent's attempt to defer ruling on this issue until *Fontroy v. Savage*, 485 F.Supp. 595 (E.D. Pa. 2007), winds its way through the Third Circuit fails to acknowledge that the Third Circuit has already determined that "legal" mail is entitled to special constitutional protection. *See Jones v. Brown*, 461 F.3d 353 (3d Cir. 2006). *Fontroy* analyzes the scope, not the existence of that protection. *Fontroy* is therefore unlikely to shed much light on the issue which this case squarely presents.

III. AN INTERLOCUTORY REVIEW PRESENTS AN APPROPRIATE VEHICLE FOR THE DETERMINATION OF QUALIFIED IMMUNITY.

Respondent argues that review is not proper on the denial of qualified immunity because there is no split among the circuits on this issue. But, this Court's review of the denial of qualified immunity does not depend on a split among the circuits. This Court has repeatedly considered interlocutory appeals from the denial of qualified immunity. *Scott v. Harris*, ___ U.S. ___, 127 S. Ct. 1769 (2007); *Hartman v. Moore*, 547 U.S. 250 (2006); *Hope v. Pelzer*, 536 U.S. 730 (2002); *Saucier v. Katz*, 533 U.S. 194 (2001). Qualified immunity is "immunity from suit" and is "effectively lost if a case is erroneously permitted to go to trial." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). An order denying qualified immunity is immediately appealable, otherwise, the order would be "effectively unreviewable." *Id.* at 527.

Respondent next asserts that *Casey* was an access to courts case, and thus is not relevant to the analysis of whether the law was clearly established for purposes of the First Amendment Free Speech Clause. If such were the case, then neither *Taylor* nor *Guajardo*, also access-to-courts cases, would be relevant to the qualified immunity analysis. But these cases are relevant to the inquiry, insofar as the Fifth Circuit's rejection of these decisions provided prison officials in the Eleventh Circuit with a reasonable belief that neither case was good law after *Brewer*. Moreover, the Eleventh Circuit expressly

relied on access-to-courts cases in determining that officials were on notice that their conduct amounted to a constitutional violation. Pet. App. p. 39. It is this reliance that warrants review.

The qualified immunity analysis looks to the objective reasonableness of an official's conduct. *Hope*, 536 U.S. at 747. In applying the objective test of what a reasonable official would understand, the significance of federal judicial precedence is a part of the Judiciary's structure. *Id.* Thus, the issue is whether a reasonable prison official would have believed that *Brewer* altered the viability of *Taylor* and *Guajardo* in light of the intervening Supreme Court case of *Casey*.

Moreover, the circuitous nature of Respondent's argument ignores the distinction between First Amendment access-to-courts claims and First Amendment free speech claims. The qualified immunity inquiry must be undertaken in light of the specific context of the case at hand, not as a broad general proposition. *Saucier*, 533 U.S. at 201. The contours of the right must be sufficiently clear such that a reasonable official has fair notice that his actions violate that right. *Id.* at 201-202. That notice is simply not present here. After *Casey*, reasonable officials could not have been expected to know that conduct that did not violate inmates' rights to access-to-courts could still violate inmates' First Amendment free speech rights. Thus this case is properly poised for review as an interlocutory appeal.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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No. 07-1485

In the Supreme Court of the United States

WARDEN HUGH SMITH AND SANCHE MARTIN,
Petitioners

v.

JAMIL AL-AMIN,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF THE STATES OF PENNSYLVANIA, ALABAMA, ALASKA, COLORADO, DELAWARE, FLORIDA, HAWAII, ILLINOIS, KANSAS, MICHIGAN, MISSISSIPPI, MISSOURI, MONTANA, NEW HAMPSHIRE, NEW MEXICO, NORTH CAROLINA, NORTH DAKOTA, OKLAHOMA, OREGON, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VIRGINIA, WASHINGTON, and WYOMING, and THE COMMONWEALTH OF PUERTO RICO, AS *AMICI CURIAE* IN SUPPORT OF THE PETITION

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QUESTION PRESENTED

This *amicus* brief addresses the following issue:

Do prison officials violate inmates' First Amendment free speech rights by opening and inspecting – but not reading – the inmates' incoming legal mail outside their presence?

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INTEREST OF THE *AMICI CURIAE* [1]

Amici curiae – Pennsylvania, 26 other States, and the Commonwealth of Puerto Rico – urge the Court to grant certiorari in this case, to resolve a constitutional issue that affects the day-to-day operation of prisons and jails throughout the country: Do inmates have a free-standing First Amendment right – distinct from their right of access to courts or any other recognized right – to be present when their incoming "legal mail" is opened and inspected for contraband? The Eleventh Circuit says that they do, but the courts of appeals have rendered conflicting decisions on whether such a right exists. There is further disagreement among the circuits over exactly what kinds of mail warrant this kid glove treatment.

Running safe, secure, and orderly prisons is one of the most difficult tasks that state governments undertake. By definition, the introduction of contraband into correctional institutions jeopardizes institutional security, and one of the time-honored ways that inmates acquire contraband is through the mail – including legal mail, or what appears to be legal mail. Requiring that prisoners' legal mail be handled by special procedures – that is, set aside, then opened and inspected in each prisoner's immediate presence, rather than in a secure mailroom – renders the entire mail-screening and delivery process less effective and less efficient. It increases the likelihood that contraband will find its way into

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[1] As required under Sup.Ct.R. 37.2(a), counsel of record for all parties received notice at least ten days prior to the applicable due date of the *amicus curiae's* intention to file this brief.

inmates' hands and, at the same time, diverts prison resources away from other needs. The associated cost to the States is significant, and there is no corresponding constitutional benefit to justify it.

SUMMARY OF ARGUMENT

I. Contraband enters prisons in various ways, including by mail, even legal mail. Prison officials do not read inmates' incoming legal mail; at most they glance at it to ascertain that it is indeed legal. But especially in this era of computers and laser printers, inmates and their confederates can easily make non-legal mail look like genuine legal mail. Unscrupulous inmates capitalize on this, to the detriment of the prison system as a whole. Where prison officials are required to open and inspect incoming legal mail in the inmates' presence, all apparent legal mail automatically gets past the prison's secure perimeter and into inmate-populated areas before being opened. There, with each inmate-addressee at the responsible officer's or employee's elbow, and with everything else that, of necessity, goes on "inside the walls," legal mail – real or phony – cannot be inspected as carefully as it would be in a more remote mailroom, where mail processing is the sole focus. Consequently, more contraband escapes, or may escape, detection. And the more kinds of mail that must be handled in this manner, the higher the odds that unauthorized items and non-genuine documents will slip through.

II. The constitutional issue presented here has not come before the Court since 1974, and even then the Court dealt with it only obliquely. The courts of appeals are divided. In holding that inmates have a distinct free speech right under the First Amendment

to be present when their legal mail is opened and inspected, the Eleventh Circuit joined the Third Circuit. Although not quite as blunt, decisions from the Second and Sixth Circuits mesh with those of the Eleventh and Third on this point. On the other hand, the Fifth and Seventh Circuits do not recognize any free speech cause of action, based on the opening of an inmate's legal mail outside his presence. To make matters worse, the lower courts also disagree on whether anything other than pure attorney-client mail, such as court mail, constitutes "legal mail" for this purpose. Given these inconsistencies, the States and the lower courts need guidance from the Court on what the Constitution does and does not require with regard to the processing of inmates' incoming legal mail.

III. Even if there are advantages, from a policy standpoint, to opening and inspecting inmates' incoming legal mail in their presence, it is not mandatory as a matter of constitutional law. Today's policies had their genesis in concerns about inmates' Sixth Amendment right to counsel in criminal prosecutions, but they were long ago cut loose from that constitutional mooring and cannot be justified under any possible reading of the Sixth Amendment. The policies were first adopted to soothe inmates' (and attorneys') "apprehensions," with minimal regard for prison officials' security concerns – an approach that is backwards by today's standards and that, logically, would require similar handling of other sensitive mail that has never been accorded the same treatment legal mail gets.

REASONS FOR GRANTING THE PETITION

I. Inmates' Use Of The Mail, Including Legal Mail, To Acquire Contraband And Otherwise Undermine Institutional Security, Is A Persistent Problem.

Prisoners are entitled to use the mail, *see Procunier v. Martinez*, 416 U.S. 396, 412-413 (1974), but they are not entitled to misuse it. By recognizing a discrete First Amendment right for inmates to be physically present whenever their incoming legal mail is opened and inspected, the Eleventh Circuit made it more difficult for prison officials to discover and deal with incidents of misuse.

Inmates' general right to send and receive mail is not absolute. The Court has recognized that, for security reasons, prison officials may regulate or prohibit some categories of incoming inmate mail without violating the First Amendment. *See Thornburgh v. Abbott*, 490 U.S. 401, 412 (1989) (noting "potential for coordinated disruptive conduct" if certain incoming publications circulate among prisoners); *Turner v. Safley*, 482 U.S. 78, 91 (1987) (ban on inmate-to-inmate correspondence is rational because "communication with other felons is a potential spur to criminal behavior"). Security concerns animate other aspects of mail processing too. At issue in this case is whether, as the Eleventh Circuit and several other circuits have held, there is a First Amendment basis for giving preferential treatment to incoming legal mail, notwithstanding the implications for institutional security.

That inmates may obtain contraband by mail cannot be gainsaid. In the early part of the last century, a prison reformer catalogued the many ways

that "dope" got into Sing Sing prison, one being that "it was concealed in books, magazines, postcards and letters[.]" Thomas Mott Osborne, *Prisons and Common Sense* 86 (1924). He added, "The ingenuity of man was exhausted in finding new ways to overreach the authorities; and the brains of the authorities were taxed to the utmost without being able to cope with the evil." *Id.*, at 87.

Inspecting incoming mail is one method by which prison officials continue to try to "cope with the evil" of drugs and other illicit items being sent to inmates. And, as the Court has observed, "The possibility that contraband will be enclosed in letters, *even those from apparent attorneys*, surely warrants prison officials' opening the letters." *Wolff v. McDonnell*, 418 U.S. 539, 577 (1974) (emphasis added). Thus, incoming legal mail, identifiable as such, may be opened and inspected – though not read. *See Id.*, 418 U.S. at 576 ("freedom from censorship is not equivalent to freedom from inspection or perusal").[2]

The States' experience confirms this Court's observation about the need to open and inspect incoming mail, even items "from apparent attorneys." Actual contraband may be secreted in what appears to be legal mail. In *State v. Steffes*, 260 Wis.2d 841, 659 N.W.2d 445 (2003), for instance, a Wisconsin inmate was investigated and prosecuted for solicitation to

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[2] There are limited circumstances under which mail, and even legal mail, may be read, such as when officials obtain permission from superiors to monitor and read the mail of a particular inmate who is suspected of wrongdoing, but prison officials do not read or censor everyone's mail on a routine basis. *See, e.g.*, 37 Pa. Code § 93.2(e); Or. Admin. r. 291-131-0030; N.C. Admin. Code tit. 5, r. 2D.0307(f); Kan. Admin. Regs. 44-12-601(c).

deliver marijuana to another prisoner. Per their agreement, the inmate's unincarcerated brother had flattened marijuana between sheets of paper, which he then mailed to the inmate in an envelope marked "legal papers," purporting to be from the Public Defender's office. A similar scam, involving marijuana coming into an Arizona jail by mail under a fictitious attorney's name, is described in Gregory Gearhart, *Controlling Contraband,* CORRECTIONS TODAY, Oct. 2006.

Besides drugs, other forms of contraband have also been smuggled into prisons using the mail. In *United States v. Young*, 146 Fed. Appx. 824 (6th Cir. 2005), the defendant and three other inmates had enlisted the help of a friend outside to purchase a hacksaw blade, conceal it in the binding of a legal pad, and mail it to the defendant in an envelope bearing an attorney's actual return address label (which the defendant had procured and sent to the friend for this purpose). *Id.*, at 826. More dramatically still, in 1999 a convicted murderer succeeded in escaping from a maximum security Pennsylvania prison, using tools that were believed by corrections officials to have been smuggled into the institution in a hollowed out section of a legal brief, which had been sent to another inmate and passed to the murderer. *See Harper v. Beard*, No. 05-1803, 2007 U.S. Dist. Lexis 55044, at *32-33 (E.D. Pa. Apr. 23, 2007), *appeal docketed*, No. 07-2347 (3d Cir. May 3, 2007); *Robinson v. Dep't of Corrections*, No. 03-5180, 2007 WL 210096, at *4-5 (Jan. 23, 2007), *appeal docketed*, No. 07-1465 (3d Cir. Feb. 15, 2007).[3]

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[3] *Harper* and *Robinson* involved mail-related claims brought under 42 U.S.C. § 1983. As recounted in the cited decisions, after [footnote continued ...]

And there is another dimension to legal-mail-related problems in modern correctional institutions. The ingenuity of today's inmates is no less than that of their Sing Sing counterparts in the 1920s, and today's inmates (and their confederates) have access to something their predecessors did not have: word processors and printers. With such equipment, they can create envelopes with ostensibly "legal" return addresses and markings, indistinguishable from true law office stationery. Whatever is sealed inside these envelopes typically will be processed as legal mail, even if it isn't. So stated the inmate plaintiff in *Felton v. Lincoln*, 429 F. Supp.2d 226 (D. Mass. 2006), who was disciplined for circumventing mail regulations. To obtain prohibited hate literature, he urged an outside accomplice to send it to him in the guise of legal mail, explaining, "You do that by making an envelope on your computer with a return address of a lawyer, like this [example in letter]. Don't use this return address, just make one up." *Id.*, 429 F. Supp.2d at 235 (alteration in opinion). This ruse works, the inmate continued, because it "makes it so they have to open it

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the 1999 escape, the Pennsylvania Department of Corrections conducted a thorough investigation and compiled a separate, special report on contraband and legal mail, describing a variety of longstanding problems and abuses. Eventually the department revised its legal mail policy in certain respects, tightening the circumstances under which incoming legal mail would be inspected in inmates' presence. The policy revisions were found constitutional in *Harper* and *Robinson* and, more recently, in *Newman v. Beard*, No. 06-214, 2008 WL 2149605, at *3-4 (W.D. Pa. May 21, 2008), *appeal docketed*, No. 08-2652 (3d Cir. June 16, 2008), as well as in *Brown v. Dep't of Corrections*, 932 A.2d 316 (Pa. Cmwlth. 2007), but they were invalidated in *Fontroy v. Beard*, No. 02-2949, 2007 WL 1289936 (E.D. Pa. May 3, 2007), *appeal docketed*, No. 07-2446 (3d Cir. May 22, 2007).

in my presence and can't read it for any reason... I've had my friends send me material this way for years, in state and county facilities in Jersey, NY, MD, and at this jail, and have never had a problem." *Id.*

Similarly, it is now easier than ever for inmates and those who cooperate with them to fabricate bogus legal documents that appear legitimate but aren't. *Cf. Spaulding v. Collins*, 867 F. Supp. 499, 501 (S.D. Tex. 1993) (inmate disciplined for "originating and possessing" forged court order). One enterprising Pennsylvania inmate created a court order reducing his sentence, along with an appropriate cover letter, and arranged for these documents to be mailed to officials at his prison in an envelope bearing the trial court's return address. *Commonwealth v. Guilford*, No. 871 Criminal 2003 (Somerset Co. Court of Common Pleas). He was convicted of forgery and other charges, and the testimony at his criminal trial revealed that his stunt was not unique; the defendant-inmate had been tutored by another inmate, who had done the same thing himself.

For prison officials, these problems are exacerbated if legal mail is defined to encompass not only attorney-client mail but also mail from courts and other types of "official" mail. If more categories of mail are deemed legal, the volume of apparent legal mail that must be opened and inspected amidst distractions, away from the mailroom (and by staff who are less likely to be mail "specialists"), is that much greater, as is the potential for legal-mail-related security breaches. *Cf. United States v. Stotts*, 925 F.2d 83, 87 (4th Cir. 1991) (when legal mail is opened in inmate's presence, "any contraband in the envelope would be within reach of the inmate," and "prisoner's obvious temptation to attempt to obtain scarce contraband may place the officer opening the mail at

risk;" risk increases as volume of specially-handled mail increases).

Inmates, like the plotters in *United States v. Young*, are well aware that legal mail is handled more solicitously than regular mail. *Id.*, 146 Fed. Appx. at 826 (inmates "knew that legal mail was always opened in the presence of the prisoner and that it was scrutinized less closely by the guards"). They seek to exploit this vulnerability. *Id. See also Felton v. Lincoln*, 429 F. Supp.2d at 235 & n.4.

While the particular security breaches summarized above were uncovered and addressed, undoubtedly many others are not. It is impossible to know how often this occurs. Just as surely, it would happen less if prison officials were not constrained to open and inspect every item of incoming legal mail in the inmate addressee's immediate presence, rather than in a secure, appropriately staffed mailroom. Where incoming legal mail is inspected, and by whom, does make a difference.

II. The Courts Of Appeals Have Rendered Inconsistent Decisions On Whether Inmates Have A Freestanding First Amendment Right To Be Present When Their Incoming Legal Mail Is Opened And Inspected.

Wolff v. McDonnell, 418 U.S. 539 (1974), was the Court's only opportunity, to date, to consider the scope of any constitutional right inmates may have to be present when their incoming legal mail is opened and inspected. The Court ultimately concluded, however, that it was unnecessary to decide "which, if any, of the asserted rights are operative" in that context. *Id.*, at 576. Instead, the Court held only that, by allowing inmates to be "present when mail from attorneys is

inspected," prison officials had "done all, and perhaps even more, than the Constitution requires." *Id.*, at 577.

Following *Wolff*, various mail-opening claims made their way to the courts of appeals, and were analyzed, *inter alia*, in access-to-courts terms. *E.g.*, *Antonelli v. Sheahan*, 81 F.3d 1422, 1430 (7th Cir. 1996); *Bieregu v. Reno*, 59 F.3d 1445, 1452-1456 (3d Cir. 1995); *Smith v. Maschner*, 899 F.2d 940, 944 (10th Cir. 1990); *Morgan v. Montanye*, 516 F.2d 1367, 1371-1372 (2d Cir. 1975). In the wake of *Lewis v. Casey*, 518 U.S. 343 (1996), however, and *Lewis's* requirement that inmates prove "actual injury," the access-to-courts theory has lost whatever attractiveness it may once have had for inmates. The question now is whether an inmate whose legal mail is opened outside his presence can get anywhere via another constitutional route. Addressing that question, the courts of appeals have taken different paths.

In this case, the Eleventh Circuit concluded that respondent "has a First Amendment free speech right to communicate with his attorneys by mail, separate and apart from his constitutional right to access to the courts." *Al-Amin v. Smith*, 511 F.3d 1317, 1334 (11th Cir. 2008). In the Eleventh Circuit's view, opening respondent's attorney mail outside his presence contravened that right. *Id.*

The Eleventh Circuit expressly aligned itself with the Third Circuit. *See Al-Amin*, 511 F.3d at 1334. In *Bieregu*, 59 F.3d at 1456, 1458, the Third Circuit had held that repeatedly opening an inmate's properly marked incoming "court mail" outside his presence violates both his First Amendment right to free speech and his constitutional right of access to the courts. After *Lewis*, the access-to-courts aspect of *Bieregu* became untenable, *see Oliver v. Fauver*, 118

F.3d 175 (3d Cir. 1997), but the Third Circuit has steadfastly reaffirmed *Bieregu's* free speech holding, *see Jones v. Brown*, 461 F.3d 353, 359 (3d Cir. 2006), *cert. denied*, 127 S.Ct. 1822 (2007); *Taylor v. Oney*, 196 Fed. Appx. 126, 128 (3d Cir. 2006).

Since *Lewis*, the Second and Sixth Circuits have rendered decisions that are consistent with those of the Eleventh and the Third on this point. They too permit inmates whose incoming legal mail was inspected outside their presence to bring constitutional challenges, unburdened by the actual injury requirement that is part and parcel of an access-to-courts claim.

The Second Circuit differentiates between the right of access to courts and the right to send and receive mail. *Davis v. Goord*, 320 F.3d 346, 351 (2d Cir. 2003). It also recognizes that "a prisoner has a right to be present when his legal mail is opened." *Id.* A violation of the latter right amounts to a violation of the broader right to send and receive mail if the inmate establishes "an ongoing practice by prison officials of interfering with his mail" (or "harm" attributable to mail tampering). *Id.*, at 352. Similarly, in the Sixth Circuit, an inmate has a "First Amendment right to receive mail, especially correspondence that impacts upon or has import for the prisoner's legal rights, the attorney-client privilege, or the right of access to the courts." *Sallier v. Brooks*, 343 F.3d 868, 874 (6th Cir. 2003). And according to that court, opening legal mail outside a prisoner's presence is unjustified, and therefore actionable under the First Amendment, "when the prisoner has specifically requested otherwise." *Id.*, at 877-878. *See also Boswell v. Mayer*, 169 F.3d 384, 388 (6th Cir. 1999) (inmate stated separate First

Amendment claim, based on right to receive mail, though claim failed on the merits).

The Fifth Circuit, in contrast, does not recognize any free speech cause of action arising out of the opening of an inmate's legal mail outside his presence. In *Brewer v. Wilkinson*, 3 F.3d 816 (5th Cir. 1993), *cert. denied*, 510 U.S. 1123 (1994), that court held "that the violation of [a] prison regulation requiring that a prisoner be present when his incoming legal mail is opened and inspected is not a violation of a prisoner's constitutional rights." *Id.*, 3 F.3d at 825.[4]

And recent Seventh Circuit decisions take the *Brewer* approach (although they do not mention it). As noted by petitioners (petition, at 10-11), in *Lewis v. Cook County Bd. of Commissioners*, 6 Fed. Appx. 428, 430 (7th Cir. 2001), the dismissal of an inmate's legal-mail-opening claim was affirmed, because he had no basis for a separate First Amendment free speech claim (and had not pled actual injury to support an access-to-courts claim). In *Kaufman v. Karlen*, No. 07-2712, 2008 WL 744140 (7th Cir. March 20, 2008), an inmate who had argued neither interference with his right to counsel nor denial of his right of access to courts lost his mail-opening case initially and on appeal. In affirming the judgment against him, the Seventh Circuit did not explicitly consider whether opening the inmate's incoming legal mail outside his presence could amount to a separate free speech violation, but the district court had analyzed that issue at length, and concluded that the First

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[4] Both the Eleventh Circuit in this case, *Al-Amin*, 511 F.3d at 1328-1329, and the Third Circuit in *Bieregu*, 59 F.3d at 1458, acknowledged but refused to follow *Brewer*.

Amendment does not afford inmates an absolute right to be present when their legal mail is opened. *Kaufman v. Karlen*, No. 06-C-205-C, 2007 WL 1821098, at *19-21 (W.D. Wis. June 21, 2007). *Accord Vasquez v. Raemisch*, 480 F. Supp.2d 1120, 1138-1141 (W.D. Wis. 2007); *West v. Endicott*, No. 06-C-763, 2008 WL 906225, at *3-7 (E.D. Wis. March 31, 2008).[5]

Further confusing the situation, the circuits disagree on what kinds of mail qualify as "legal" mail. *Wolff* itself only concerned attorney mail. *Id.*, 418 U.S. at 576-577. While recognizing that the point of opening legal mail in an inmate's presence is to protect the attorney-client privilege and preserve confidentiality, the Eighth Circuit has cautioned that "the mere fact that a letter comes from a legal source is insufficient to indicate that it is confidential and requires special treatment." *Harrod v. Halford*, 773 F.2d 234, 236 (8th Cir. 1985), *cert. denied*, 476 U.S. 1143 (1986). The Sixth Circuit takes a broader view, holding that at least some mail from the State Attorney General's office is to be opened in the inmate's presence, *Boswell*, 169 F.3d 389-390; *Muhammad v. Pitcher*, 35 F.3d 1081, 1085-1086 (6th Cir. 1994), and that "mail from a court constitutes 'legal mail' and cannot be opened outside the presence of a prisoner[.]" *Sallier*, 343 F.3d at 877. In the Third Circuit, too, incoming court mail must be opened in the inmate's presence. *Bieregu v. Reno*, 59 F.3d 1445 (3d Cir. 1995). But inmates' incoming court mail, being largely a matter of public record, is not deemed

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[5] *But see Antonelli v. Sheahan*, 81 F.3d 1422, 1432 (7th Cir. 1996) (inmate's allegations, regarding both incoming and outgoing mail, sufficient to state claims for "violations of free speech and association").

"legal mail" in the Ninth Circuit, *Keenan v. Hall*, 83 F.3d 1083, 1084 (9th Cir. 1996), or in the Seventh Circuit, *Martin v. Brewer*, 830 F.2d 76, 78 (7th Cir. 1987). *See also McCain v. Reno*, 98 F. Supp.2d 5, 7-8 (D. D.C. 2000) (Constitution does not require same treatment for court mail as for attorney mail).

III. There Is No Constitutional Basis For Requiring Inmates' Incoming Legal Mail To Be Opened And Inspected In Their Presence.

"The policy that incoming confidential legal mail should be opened in inmates' presence ... serves the prophylactic purpose of assuring them that confidential attorney-client mail has not been improperly read in the guise of searching for contraband." *Gardner v. Howard*, 109 F.3d 427, 431 (8th Cir. 1997). Such policies, like Georgia's in this case, are now widespread. However, just because something is dictated by policy, or required under state regulations, it does not follow that it is mandatory as a matter of constitutional law. *Cf. Bell v. Wolfish*, 441 U.S. 520, 554 (1979) (Constitution does not mandate "lowest common denominator" security standard, whereby practice permitted at one institution must be permitted everywhere).

Judicially sanctioned policies calling for incoming legal mail to be opened in inmates' presence appear to be traceable to *Smith v. Robbins*, 328 F. Supp. 162 (D. Me. 1971), *aff'd in relevant part*, 454 F.2d 696 (1st Cir. 1972). There, the parties had agreed that incoming legal mail was subject to being opened and inspected (but not read) by prison officials; the only question before the court was whether the addressee inmate had to be allowed to watch. Noting that part of the Sixth Amendment guarantee of the effective

assistance of counsel is "the opportunity for free and private communication between the attorney and his client," the district court stressed that – notwithstanding the express prohibition on reading incoming attorney mail – "if the opening occurs in the absence of the inmate, his attorney will still be reluctant to communicate fully with his client because of the fear that his correspondence will be read by others." *Id.*, 328 F. Supp. at 164-165. This, the court concluded, "clearly" had no security implications, but would have a chilling effect on the inmates' right to effective assistance of counsel. *Id.*

Affirming, the First Circuit focused on the "apprehensions" of inmates and their attorneys and discounted the warden's concerns: "The court does not suggest that the warden is untrustworthy. Rather, it is that a prisoner, and possibly some attorneys, may feel, if only to a small degree, that someone in the chain of command may not be trusted, and that the resulting fear may chill communications between the prisoner and his counsel." *Smith*, 454 F.2d at 697. So, the court said, "the burden must be on the warden to show a need for any act which could produce even a suspicion of intrusion." *Id.*

Smith was cited with approval by the concurring judges in *Moore v. Ciccone*, 459 F.2d 574, 578 (8th Cir. 1972). Soon thereafter, in *McDonnell v. Wolff*, 483 F.2d 1059, 1066-1067 (8th Cir. 1973), the Eighth Circuit followed the *Moore* concurrence. On further review, this Court did not specifically endorse the original Sixth Amendment rationale for requiring inmates to be present for the opening and inspecting of their incoming legal mail, nor, indeed, did the Court definitively identify any other constitutional basis for such policies. *Wolff v. McDonnell*, 418 U.S. 539, 575-576 (1974). Rather, as mentioned earlier, the

Court concluded that Nebraska officials had "done all, and perhaps even more, than the Constitution requires." *Id.*, at 577. Nevertheless, over time, the dicta in *Wolff* have taken on a life of their own.

By now, the Sixth Amendment rationale originally put forward to justify open-in-inmates'-presence requirements has been stretched beyond recognition (if not altogether forgotten). These days, all attorney mail, and sometimes court mail and other "official" mail, tends to receive preferential handling. But the "reach" of the Sixth Amendment "is only to protect the attorney-client relationship from intrusion in the criminal setting." *Wolff*, 418 U.S. at 576. The Sixth Amendment does not even extend to *habeas corpus* proceedings (in which many inmates are involved), *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987), let alone to other legal settings or proceedings. So, to the extent that attorney-inmate communications outside the criminal context are confidential, it is not because the Sixth Amendment protects them. The attorney-client privilege may apply to such communications, but that privilege derives from the common law, not from the Constitution. *See Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998); *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

More broadly, according primacy to inmates' feelings, and putting the onus on prison officials to justify anything "which could produce even a suspicion of intrusion," *Smith*, 454 F.2d at 697, is dramatically at odds with the Court's approach to prisoners' rights cases. When the constitutionality of prison officials' actions or policies is challenged, it is the challengers – not the proponents – who bear the burden of proof. *E.g.*, *Overton v. Bazetta*, 539 U.S. 126, 132 (2003) (burden "is not on the State to prove the validity of prison regulations but on the prisoner to

disprove it"). After all, the rule is that reading inmates' mail is prohibited; and under the Court's precedents, it cannot simply be assumed that correctional officers or mailroom staff will disregard that prohibition.[6] And it is the decisions of prison officials on how best to run correctional institutions – not the "apprehensions" of inmates – that are entitled to considerable deference. *E.g., Beard v. Banks*, 126 S.Ct. 2572, 2578 (2006); *Jones v. N.C. Prisoners' Labor Union*, 433 U.S. 119, 132 (1989).

Moreover, if the constitutionality of prison policies regarding the inspection of incoming mail hinges on how inmates feel about those policies, why should legal mail be singled out for special handling? There are other types of sensitive, even privileged, incoming mail, such as communications from spouses or members of the clergy. Those are not opened and inspected in the inmates' presence, much as inmates and their correspondents might prefer otherwise. *See* Asha Bandele, *The Prisoner's Wife: A Memoir* 34, 35 (1999) ("Rashid and I gave ourselves up to each other,

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[6] As a practical matter, the volume of incoming mail, most of which is not "legal," is too great for whoever is inspecting it to spend time zeroing in on and reading any particular item, even if the inspector were inclined to do so. According to one study, inmates sent and received an average of four pieces of mail each per week in 2005. Heath C. Hoffmann, *et al.*, *Communication Policy Changes in State Adult Correctional Facilities From 1971 to 2005*, CRIMINAL JUSTICE REVIEW (2007), at 53. The Georgia State Prison, where this case arose, has the capacity to house 1,334 felons, and therefore likely must process over 5,000 pieces of inmate mail per week. Legal mail would be a small percentage of the total. *See O'Keefe v. Van Boening*, 82 F.3d 322, 323 (9th Cir. 1996) ("legal mail constitutes only about five percent of all mail").

publicly, in monitored phone calls, in scrutinized letters, and finally on videotape in prison visiting rooms.... [S]trangers and even enemies could read our every letter[.]") Neither the Court of Appeals in this case, nor any other of the lower courts that mandate special treatment for legal mail, has attempted to explain how the First Amendment supports such a distinction.

Overall, the privacy rights of inmates are curtailed in many respects. *See Hudson v. Palmer*, 468 U.S. 517 (1984). The Constitution does not mandate that inmates be present when their cells are searched, *see Block v. Rutherford*, 468 U.S. 576, 590-591 (1984); *Bell v. Wolfish*, 441 U.S. 520, 555 (1979), and it also does not mandate that inmates be present when their incoming legal mail is opened and inspected (but not read).

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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